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Page.	*Line.*	*For*	*Read*
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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Alderman *v.* Great Western Ry. Co. (C. A.) 90
Altrincham Urban District Council, White *v.* (C. A.) 138
Appenrodt *v.* Central Middlesex Assessment Committee 447
Att.-Gen. *v.* Cohen 246

B.

Barclays Bank Ld., Plunkett *v.* 107
Berliner, Green *v.* 477
Bertram *v.* Wightman (Inspector of Taxes) 521
Bibby, The King *v.* 442
Bilsland *v.* Inland Revenue Commissioners 542
Bloom and the London Passenger Transport Board, English *v.* 550
Bloom and the London Passenger Transport Board, Siegenberg *v.* 550
Boag *v.* Standard Marine Insurance Company, Ld. 121
Bolton & Norris, Otto *v.* 46

PAGE

Broxbourne Sand & Ballast Pits, Ld., Hertfordshire County Council *v.* 19
Broxbourne Sand & Ballast Pits, Ld., Hoddesdon Urban District Council *v.* 19
Burgoyne *v.* Rose Bridge Colliery Company, Ld. (C. A.) 1

C.

Cambridgeshire County Council, London County Council *v.* 298
Canons, Ld., Craven-Ellis *v.* (C. A.) 403
Caplan, Trollope (George) & Sons *v.* (C. A.) 382
Cattermole (Inspector of Taxes), Reed *v.* 645
Central Middlesex Assessment Committee, Appenrodt *v.* 447
Chenery, Newell *v.* 632, 637
Clayton, Strangways-Lesmere *v.* 11
Cohen, Att.-Gen. *v.* 246
Cook, Newell *v.* 632, 635
Craven-Ellis *v.* Canons, Ld. (C. A.) 403
Cross, Newell *v.* 632, 633
Croxford *v.* Universal Insurance Company, Ld. (C. A.) 253, 254
Cullen, Morgan *v.* (C. A.) 324

D.

PAGE

Dale, Dodworth (Inspector of Taxes) *v.* 503
Darwen Cotton Manufacturing Company, Ld., Kenyon *v.* (C. A.) 193
Davis *v.* Lisle 434
De La Rue *v.* Hernu, Peron & Stockwell, Ld. De La Rue (Claimant) (C. A.) 164
Dodworth (H.M. Inspector of Taxes) *v.* Dale 503
Duder, Furness Withy & Company, Ld. *v.* 461
Dunscombe, Rex *v.* 442

E.

Emmett, Hollywood Silver Fox Farm, Ld. *v.* 468
English *v.* Bloom and the London Passenger Transport Board 550

F.

Fenton's Trustee *v.* Inland Revenue Commissioners (C. A.) 59
Furness Withy & Company, Ld. *v.* Duder 461

G.

Gaskell & Chambers, Ld., Ex parte. The King *v.* Hudson 595
Gaskell & Chambers, Ld. *v.* Hudson Dodsworth & Company 595
Gee, The King *v.* 442
Great Western Ry. Co., Alderman *v.* (C. A.) 90
Green *v.* Berliner 477
Greene, Mason & Wood, Ld. *v.* (C. A.) 370
Gregory, Strood Estates Company, Ld. *v.* (C. A.) 605
Gresham Fire and Accident Insurance Society, Ld., Norman *v.* (C. A.) 253, 260

H.

PAGE

Haseldine *v.* Winstanley 101
Hatherton (Lord) (Executors), Inland Revenue Commissioners *v.* 316
Heginbottam *v.* Watts (C. A.) 6
Hernu, Peron & Stockwell, Ld., De La Rue *v.* De La Rue (claimant) (C. A.) 164
Hertfordshire Urban District Council *v.* Broxbourne Sand and Ballast Pits, Ld. 19
Hoddesdon Urban District Council *v.* Broxbourne Sand and Ballast Pits, Ld. 19
Hollywood Silver Fox Farm, Ld. *v.* Emmett 468
Houghton and Chester-le-Street Assessment Committee, Robinson Brothers (Brewers), Ld. *v.* 283
Hudson, Dodsworth & Company, Gaskell & Chambers, Ld. *v.* 595
Hudson, The King *v.* Ex parte Gaskell & Chambers, Ld. 595

I.

Inland Revenue Commissioners, Bilsland *v.* 542
Inland Revenue Commissioners, Fenton's Trustee *v.* (C. A.) 59
Inland Revenue Commissioners *v.* Hatherton (Lord) (Executors) 316
Inland Revenue Commissioners *v.* Pearson 533
Inland Revenue Commissioners, Peterborough Royal Foxhound Show Society *v.* 497
Inland Revenue Commissioners *v.* Pratt 533
Inland Revenue Commissioners, Shrewsbury (Countess of) *v.* 582
Inland Revenue Commissioners, Trinidad Petroleum Development Company, Ld. *v.* 185
Izzard *v.* Universal Insurance Company, Ld. 303
Izzard *v.* Universal Insurance Company, Ld, (C. A.) 555

K.

PAGE

Kenyon v. Darwen Cotton Manufacturing Company, Ld. (C. A.) 193
Knowles v. Southern Ry. Co. (C. A.) 330
Kritz, Van Dusen v. 176

L.

Leeson v. Leeson (C. A.) 156
Lisle, Davis v. 434
London County Council v. Cambridgeshire County Council 298

M.

Mason & Wood, Ld. v. Greene (C. A.) 370
Minister of Health, The King v. Ex parte Villiers 29
Moore, Morley v. (C. A.) 359
Morgan v. Cullen (C. A.) 324
Morley v. Moore (C. A.) 359

N.

Nash v. Stevenson Transport, Ld. (C. A.) 128
Newell v. Chenery 632, 637
Newell v. Cook 632, 635
Newell v. Cross 632, 633
Newell v. Plume 632, 636
Norman v. Gresham Fire and Accident Insurance Society, Ld. (C. A.) 253, 260

O.

Ogden, Ex parte. The King v. Salford Assessment Committee 626
Otto v. Bolton & Norris 46

P.

Pearson, Inland Revenue Commissioners v. 533
Peterborough Royal Foxhound Show Society v. Inland Revenue Commissioners 497
Pitt-Rivers, Queen Anne's Bounty Governors v. 416

PAGE

Plume, Newell v. 632, 636
Plunkett v. Barclays Bank Ld. 107
Pratt, Inland Revenue Commissioners v. 533
Pratt, Rowell v. (C. A.) 226

Q.

Queen Anne's Bounty Governors v. Pitt-Rivers 416

R.

Reed v. Cattermole (Inspector of Taxes) 645
Rex v. Bibby 442
Rex v. Dunscombe 442
Rex v. Gee 442
Rex v. Hudson; Ex parte Gaskell & Chambers, Ld. 595
Rex v. Minister of Health. Ex parte Villiers 29
Rex v. Salford Assessment Committee. Ex parte Ogden 626
Robinson Brothers (Brewers), Ld. v. Houghton and Chester-le-Street Assessment Committee 283
Rose Bridge Colliery Company, Ld., Burgoyne v. (C. A.) 1
Rowell v. Pratt (C. A.) 226

S.

Salford Assessment Committee, The King v. Ex parte Ogden 626
Shrewsbury (Countess of) v. Inland Revenue Commissioners 582
Siegenberg v. Bloom and the London Passenger Transport Board 550
Southern Ry. Co., Knowles v. (C. A.) 330
Standard Marine Insurance Company, Ld., Boag v. 121
Stevens v. Walker (C. A.) 215
Stevenson Transport, Ld., Nash v. (C. A.) 128
Strangways-Lesmere v. Clayton 11
Strood Estates Company, Ld. v. Gregory (C. A.) 605

T.

PAGE

Trinidad Petroleum Development Company, Ld. *v.* Inland Revenue Commissioners 185
Trollope (George) & Sons *v.* Caplan (C. A.) 382

U.

Universal Insurance Company, Ld., Croxford *v.* (C. A.) 253, 254
Universal Insurance Company, Ld., Izzard *v.* 303
Universal Insurance Company, Ld., Izzard *v.* (C. A.) 555

V.

PAGE

Van Dusen *v.* Kritz 176
Villiers, Ex parte. The King *v.* Minister of Health 29

W.

Walker, Stevens *v.* (C. A.) 215
Watts, Heginbottam *v.* (C. A.) 6
White *v.* Altrincham Urban District Council (C. A.) 138
Wightman (Inspector of Taxes), Bertram *v.* 521
Winstanley, Haseldine *v.* 101

TABLE OF CASES CITED.

A.

		PAGE
A. *v.* A.	19 L. R. Ir. 403	517
A. *v.* B.	L. R. 1 P. & M. 559	512
Admiralty Commissioners *v.* S.S. Amerika	[1917] A. C. 38	461
Allen *v.* Flood	[1898] A. C. 1	469
Allison, Johnson & Foster, Ld. Ex parte Birkenshaw	[1904] 2 K. B. 327	403
Alsop *v.* Oxford (Lord)	1 Myl. & K. 564	140
American Surety Co. *v.* Wrightson	16 Com. Cas. 37	123
Amey *v.* Long	9 East, 473	231
Anderton *v.* Halstead, Ld. *v.* Birrell	[1932] 1 K. B. 271	510
Ankin *v.* London & North Eastern Ry. Co.	[1930] 1 K. B. 527	235
Anonymous (Case 131)	12 Mod. 73	319
Anstey *v.* Manners	Gow. 10	512
Arthur *v.* Bokenham	11 Mod. 148	238
Asch Kenasy *v.* Midland Bank Ld.	50 Times L. R. 209; 51 Times L. R. 34	112
Ashton Gas Co. *v.* Att.-Gen.	[1906] A. C. 10	533
Att.-Gen. *v.* London County Council	[1907] A. C. 131	189
——— *v.* Metropolitan Water Board	[1928] 1 K. B. 833; 13 Tax Cas. 294 . . 62, 84*n.*	189
——— *v.* National Provincial Bank	[1924] A. C. 262	502

B.

Back *v.* Daniels	[1925] 1 K. B. 526	521
Baldey *v.* Parker	2 B. & C. 37	249
Balmoral Steam Ship Co., Ld. *v.* Marten	[1902] A. C. 511	123
Banks *v.* Hollingsworth	[1893] 1 Q. B. 442	219
Barnes *v.* Nunnery Colliery Co.	[1912] A. C. 44; 5 B. W. C. C. 195	342
Bateson *v.* Hartsink	4 Esp. 43	231
Beatson *v.* Skene	5 H. & N. 838	235
Bent *v.* Roberts	3 Ex. D. 66; 1 Tax Cas. 199	651
Berkshire County Council *v.* Reading Borough Council	[1921] 2 K. B. 787	298
Birkenshaw, Ex parte. In re Allison, Johnson & Foster, Ld.	[1904] 2 K. B. 327	403
Birmingham Corporation *v.* Inland Revenue Commissioners	[1930] A. C. 307	63
Birmingham & District Land Co. *v.* L. & N. W. Ry. Co.	34 Ch. D. 261	465
Blackpool Corporation *v.* Starr Estate Co.	[1922] 1 A. C. 27	37
Bootle Overseers *v.* Liverpool Warehousing Co.	85 L. T. 45	525
Borley *v.* Ockenden	[1925] 2 K. B. 325; 18 B. W. C. C. 55	335
Bottomley *v.* Bannister	[1932] 1 K. B. 458	46
Bowden *v.* Russell	46 L. J. (Ch.) 414	595

		PAGE
Bradford Corporation *v.* Pickles	[1895] A. C. 587	469
Bradford-on-Avon Union *v.* White	[1898] 2 Q. B. 630	283
Brice *v.* Edward Lloyd, Ld.	[1909] 2 K. B. 804; 2 B. W. C. C. 26	334
Briggs *v.* Morgan	3 Phill. 325	507
Britain *v.* Rossiter	11 Q. B. D. 123	406
Brooke *v.* Price	[1917] A. C. 115	582

C.

Caledonian Ry. Co. *v.* Glenboig Union Fireclay Co.	[1911] A. C. 290	22
——— *v.* Mulholland	[1898] A. C. 216	56
Campbell *v.* Leach	2 Amb. 740	319
Cardigan (Earl) *v.* Armitage	2 B. & C. 197	319
Carnarvon (Earl of) *v.* Inland Revenue Commissioners	19 Tax Cas. 455	63
Carne *v.* Brice	7 M. & W. 183	175
Carrington *v.* Taylor	11 East. 571	472
Casamajor *v.* Strode	Cooper temp. Brough, 510	249
Castellain *v.* Preston	11 Q. B. D. 380	125, 360
Catlin, In re	18 Beav. 508	144
Cavalier *v.* Pope	[1906] A. C. 428	49
Central London Ry. Co. *v.* Inland Revenue Commissioners	151 L. T. 333	63
Chambers *v.* Griffiths	1 Esp. 150	249
Chester *v.* Bateson	[1920] 1 K. B. 829	238
Christie *v.* Davey	[1893] 1 Ch. 316	471
Clarke *v.* Cuckfield Union	21 L. J. (Q. B.) 349	411
Clay *v.* Yates	1 H. & N. 73	414
Clements *v.* Ward. In re Smith's Estate	35 Ch. D. 589	30
Codd *v.* Cabe	1 Ex. D. 352	436
Collis *v.* Selden	L. R. 3 C. P. 495	52
Commonwealth, The	[1907] P. 216	123
Cook *v.* Imperial Tobacco Co.	[1922] 2 K. B. 158	218
Cook *v.* Lister	13 C. B. (N. S.) 543	360
Corke *v.* Fry	3 Tax Cas. 335; 22 R. 422	654
Cornelius *v.* Phillips	[1918] A. C. 199	287
Corrance *v.* Corrance	L. R. 1 P. & M. 495	514
Crane *v.* Director of Public Prosecutions	[1921] 2 A. C. 299	446
Critchley *v.* Brown	2 Times L. R. 238	217
Cutter *v.* Powell	2 Smith's Leading Cases at p. 16	390

D.

Davidson & Co. *v.* M'Robb	[1918] A. C. 304; 10 B. W. C. C. 673	92
Davies *v.* Gwauncaegurwen Colliery	[1924] 2 K. B. 651; 17 B. W. C. C. 181	334
Davis, Ex parte. The King *v.* Minister of Health	[1929] 1 K. B. 619	37
——— *v.* Clarke	6 Q. B. 16	105
De Lassalle *v.* Guildford	[1901] 2 K. B. 215	48
Dewar *v.* Inland Revenue Commissioners	[1935] 2 K. B. 351	525
Dickson *v.* Hampstead Borough Council	11 Tax Cas. 691	63
Dobson *v.* Jones	5 Man. & G. 112	650
Dodds *v.* South Shields Assessment Committee	[1895] 2 Q. B. 133	292

		PAGE
Doe d. Douglas *v.* Lock	2 A. & E. 705	319
Donoghue *v.* Stevenson	[1932] A. C. 562	46, 472
Dormer *v.* Ward	[1901] P. 20	508
Douglas Doe d. *v.* Lock	2 A. & E. 705	319
Dunbar *v.* Dunbar	[1909] 2 Ch. 639	516

E.

Edinburgh Life Assurance *v.* Lord-Advocate	[1910] A. C. 143	63
Edwards (John) & Co. *v.* Motor Union Insurance Co.	[1922] 2 K. B. 249	124
Elliott & Sugden *v.* Gurr	2 Phill. 16	512
Emmerson *v.* Heelis	2 Taunt. 38	249
Ermen, In re	[1903] 2 Ch. 156	144
Errington *v.* Minister of Health	[1935] 1 K. B. 249	36
Estler Brothers *v.* Phillips	127 L. T. 73 ; 15 B. W. C. C. 291	336
Evans *v.* Baxter	46 Times L. R. 270	605
—— *v.* Liverpool Corporation	[1906] 1 K. B. 160	12
Everitt *v.* Eastaff & Co.	6 B. W. C. C. 184	334

F.

Fancy *v.* Scott	2 Man. & Ry. 335	319
Farr *v.* Butters Brothers & Co.	[1932] 2 K. B. 606	57
Farrer *v.* Lowe	5 Times L. R. 234	218
Fisher *v.* Drewett	39 L. T. 253	385
Fitzgerald *v.* Champneys	2 J. & H. 31 ; 30 L. J. (Ch.) 777	38, 39
Flach *v.* London & South Western Bank, Ld.	31 Times L. R. 334	108
Forster *v.* Baker	[1910] 2 K. B. 636	478
France *v.* Clark	26 Ch. D. 257	104
Fry *v.* Moore	23 Q. B. D. 395	326
—— *v.* Salisbury House Estate, Ld.	[1930] A. C. 432	524

G.

G. *v.* M.	10 App. Cas. 171	508
Galbraith *v.* Grimshaw & Baxter	[1910] 1 K. B. 339	112
Galliard *v.* Laxton	2 B. & S. 363	436
Garnett *v.* Bradley	3 App. Cas. 944	37
Garrallan Coal Co. *v.* Anderson or Devlin	[1927] A. C. 59 ; 19 B. W. C. C. 356	338
Gaunt *v.* Fynney	L. R. 8 Ch. 8	469
General Medical Council *v.* Inland Revenue Commissioners	13 Tax Cas. 819	502
Gilbert *v.* Gilbert & Boucher	[1928] P. 1	40
Gimson *v.* Inland Revenue Commissioners	[1930] 2 K. B. 246	536
Glasgow *v.* Independent Printing Co.	[1901] 2 I. R. 278	200
Goldsmith *v.* Deakin	[1933] W. N. 255 ; 50 Times L. R. 73	635
Grant *v.* Australian Knitting Mills	[1936] A. C. 85	49
Gray *v.* Johnston	L. R. 3 H. L. 1	112
Great Central Ry. Co. *v.* Banbury Union	[1909] A. C. 78	289
———————— *v.* Bates	[1921] 3 K. B. 578	434
Great Western Ry. Co. *v.* "Mostyn" Steamship Owners	[1928] A. C. 57	287
Greville-Nugent *v.* Mackenzie	[1900] A. C. 83	320
Grogan *v.* Smith	7 Times L. R. 132	385

H.

		PAGE
Hall *v.* Lees	[1904] 2 K. B. 602	12
Hamlyn *v.* Betteley	6 Q. B. D. 63	167
Hancock *v.* Smith	41 Ch. D. 456	111
Hargreaves (Joseph), In re	[1900] 1 Ch. 347	239
Harrison *v.* Southwark & Vauxhall Water Co.	[1891] 2 Ch. 409	472
——— *v.* Ward. In re Ward	[1922] 1 Ch. 517	507
Hartland *v.* Diggines	[1896] A. C. 289; 10 Tax Cas. 247	536, 649
Hatch *v.* Searles	2 Sm. & Giff. 147	104
Heaven *v.* Pender	11 Q. B. D. 503	50
Heilbut Symons & Co. *v.* Buckleton	[1913] A. C. 30	48
Henman *v.* Dickinson	5 Bing. 183	105
Herbert *v.* Samuel Fox & Co.	[1916] 1 A. C. 405; 9 B. W. C. C. 164	336
Hewlett *v.* Allen & Sons	[1892] 2 Q. B. 662; [1894] A. C. 383	199
Hext *v.* Gill	L. R. 7 Ch. 699	22
Hill *v.* Gregory	[1912] 2 K. B. 61	522
—— *v.* Peel	L. R. 5 C. P. 172	141
Hillyer *v.* St. Bartholomew's Hospital Governors	[1909] 2 K. B. 820	12
Hirachand Punamchand *v.* Temple	[1911] 2 K. B. 330	359
Hodgkinson *v.* Hewitt	139 L. T. 401; 44 Times L. R. 694	605
Hogarth *v.* Latham	3 Q. B. D. 643	104
Holliday *v.* Lockwood	[1917] 2 Ch. 47	249
Holloway *v.* Egham Urban District Council	72 J. P. 433	24
Holywell Union *v.* Halkyn Drainage Co.	[1895] A. C. 117	524
Howe (Earl) *v.* Inland Revenue Commissioners	[1919] 2 K. B. 336	80
Hughes *v.* Chatham Overseers	5 Man. & G. 54	651

I.

Ibbotson *v.* Peat	3 H. & C. 644	469
Inchbald *v.* Western Neilgherry Coffee, etc., Co.	17 C. B. (N. S.) 733	389
Income Tax Commissioners *v.* Pemsel	[1891] A. C. 531	498
Inland Revenue Commissioners *v.* Holder	[1931] 2 K. B. 81; [1932] A. C. 624	62, 65
——— *v.* Miller	[1930] A. C. 222; 15 Tax Cas. 25	524, 645, 654
——— *v.* Wemyss	1924 S. C. 284; 61 S. L. R. 262; 8 Tax Cas. 551	525, 656*n*.
Inland Revenue *v.* Sutherland. *See* M'Dougall *v.* Sutherland.		
——— *v.* Yorkshire Agricultural Society	[1928] 1 K. B. 611; 13 Tax Cas. 58	502
Inverclyde *v.* Inverclyde	[1931] P. 29	508

J.

		PAGE
James *v.* Probyn	Unreported; *See* The Times May 29, 1935	13
—— *v.* Shore	1 Stark. 426	249
Jauncey, In re	[1926] 1 Ch. 471	64
Jennings *v.* London General Omnibus Co.	30 L. T. 266	219
Jersey (Earl) *v.* Neath Union (Guardians)	22 Q. B. D. 555	22

K.

Keeble *v.* Hickeringill	11 Mod. 74; 11 East, 574*n.*; 3 Salk. 9; Holt, 14	469, 472
Keeves *v.* Dean	[1924] 1 K. B. 685	610
Kent County Council *v.* London County Council	84 L. J. (K. B.) 1781	300
Kimbers & Co. *v.* Inland Revenue	[1936] 1 K. B. 132	249

L.

Lane *v.* Cox	[1897] 1 Q. B. 415	54
Larner *v.* Larner	[1905] 2 K. B. 539	167
Lavelle *v.* Glasgow Royal Infirmary	1932 S. C. 245	12, 13
Lawford *v.* Billericay Rural District Council	[1903] 1 K. B. 772	411
Lawrence *v.* Cassell	[1930] 2 K. B. 83	49
Lea *v.* Parker	13 Q. B. D. 835	218
Leader, The	L. R. 2 A. & E. 314	118
Lee *v.* Birrell	3 Camp. 337	239
Lewin *v.* Guest	1 Russ. 325	249
Lewis *v.* Hayward	55 L. J. (P.) 105	511
Liverpool Corporation *v.* Chorley Union Assessment Committee	[1911] 1 K. B. 1057; [1912] 1 K. B. 270; [1913] A. C. 197	524, 525
London & Blackwall Ry. Co. *v.* Limehouse & District Board of Works	3 K. & J. 123	39
London County Council *v.* Att.-Gen.	[1901] A. C. 26	63, 523, 524
London County Council *v.* Wilts County Council	91 J. P. 122	300
London Joint Committee, Ex parte. Rex *v.* Electricity Commissioners	[1924] 1 K. B. 171	30
London & North Eastern Ry. Co. *v.* Brentnall	[1933] A. C. 489	91
Luipaards Vlei Estate & Gold Mining Co., Ld., *v.* Inland Revenue Commissioners	[1930] 1 K. B. 593	189

M.

M'Dougall (or Inland Revenue) *v.* Sutherland	3 Tax Cas. 261; 21 R. 753	654
Macduff, In re	[1896] 2 Ch. 451	501
MacPherson *v.* Buick Motor Co.	217 N. Y. 382	57
Mahmoud and Ispahani, In re	[1921] 2 K. B. 716	133
Malone *v.* Laskey	[1907] 2 K. B. 141	52
Marland *v.* Inland Revenue Commissioners	19 Tax Cas. 467	63
Marshall *v.* Lindsey County Council	[1935] 1 K. B. 516	13

		PAGE
Martin *v.* Lovibond & Sons	[1914] 2 K. B. 227 ; 7 B. W. C. C. 243	334
Mason *v.* Lack	140 L. T. 696 ; 45 Times L. R. 363	104
Mersey Docks & Harbour Board, Ex parte	[1899] 1 Q. B. 546	167
Michelham *v.* Inland Revenue Commissioners	15 Tax Cas. 737	536
Miles *v.* Dawson	1 Esp. 405	231
Miller *v.* Cannon Hill Estates	[1931] 2 K. B. 113	48
Moody & Yates' Contract, In re	30 Ch. D. 344	318
Moon *v.* Durden	2 Exch. 22	259
Moore (A. G.) & Co. *v.* Donnelly	[1921] 1 A. C. 329 ; 13 B. W. C. C. 458	342
Morgan and Provincial Insurance Co., In re	[1932] 2 K. B. 70	578
Morisse *v.* Royal British Bank	1 C. B. (N. S.) 67	30
Morrice *v.* Antrobus	Hardress Rep. 325	319
Morris, In re	[1922] 1 Ch. 126	64
Muller (W. H.) & Co. (London), Ld. *v.* Inland Revenue Commissioners	14 Tax Cas. 116	62

N.

Napier *v.* Napier	[1915] P. 184	507
Nautilus Steam Shipping Co., In re	[1936] 1 Ch 17	262
Neumann *v.* Inland Revenue Commissioners	[1933] 1 K. B. 728 ; [1934] A. C. 215 ; 18 Tax Cas. 332	533, 582
Newbould *v.* Att.-Gen.	[1931] P. 75	507
Nicholson *v.* Bradfield Union	L. R. 1 Q. B. 620	412
——— *v.* Jackson	37 Times L. R. 887 ; Affg. 36 Times L. R. 854	605, 611
Nicoll *v.* Austin	19 Tax Cas. 531	654
North British Ry. Co. *v.* Scott	[1923] A. C. 37 ; 8 Tax Cas. 332	536, 582
North of England Iron Steamship Insurance Association *v.* Armstrong	L. R. 5 Q. B. 244	123
Norton *v.* Seton	3 Phill. 147	507
Nosotti *v.* Auerbach	15 Times L. R. 140	385
Nottage, In re	[1895] 2 Ch. 649	502

O.

Oakey, Ex parte. Rex *v.* North	[1927] 1 K. B. 491	424
Ogilvie's Estate	[1910] P. 243	140
Oliver *v.* Saddler & Co.	[1929] A. C. 584	56
Osborne *v.* Richards	[1933] 1 K. B. 283	640
Owens *v.* Woosman	L. R. 3 Q. B. 469	218

P.

P. *v.* P.	[1916] 2 I. R. 400	408
Palmer *v.* Roberts	29 L. T. 403	217
Parker *v.* Guinness	27 Times L. R. 129	159
Parkfield Trust, Ld. *v.* Curtis	[1934] 1 K. B. 685	370
Payne *v.* British Time Recorder Co.	[1921] 2 K. B. 1	478
Peacock *v.* Freeman	4 Times L. R. 541	385

		PAGE
Penman *v.* Fife Coal Co.	[1936] A. C. 45	200
Perry *v.* London General Omnibus Co.	[1916] 2 K. B. 335	218
Perry's Case cited in "The St. James's Evening Post" and "Champion" Case; Roach *v.* Garvan	2 Atk. 469; Dick. 794	595, 598
Peto *v.* Reynolds	9 Ex. 410; 11 Ex. 418	104
Philbin *v.* Hayes	11 B. W. C. C. 85	91
Pickering *v.* Ilfracombe Ry. Co.	L. R. 3 C. P. 235	202
Plumb *v.* Cobden Flour Mills Co.	[1914] A. C. 62; 7 B. W. C. C. 1	335
President Van Buren, The	132 L. T. 253; 16 Asp. M. C. 444	463
Prickett *v.* Badger	1 C. B. (N. S.) 296	385
Privett *v.* Darracq Motor Engineering Co.	151 L. T. 211; 27 B. W. C. C. 163	326

Q.

Queen Anne's Bounty, Ex parte. Rex *v.* Clements (Judge)	Times Newspapers, July 28, 1933, p. 3	424
———————— *v.* Thorne	[1934] 2 K. B. 175	422
Quilter *v.* Mapleson	9 Q. B. D. 672	259

R.

Read *v.* Pacific Navigation Co.	15 B. W. C. C. 39	337
Reddie *v.* Williamson	1 Macph. 228 (S. C.)	65
Reg. *v.* L. & N.W. Ry. Co.	L. R. 9 Q. B. 134	289
—— *v.* Paulett	L. R. 8 Q. B. 491	418
—— *v.* Payne and Cooper	[1896] 1 Q. B. 577	595
—— *v.* St. Pancras Assessment Committee	2 Q. B. D. 581	524
Rex *v.* Clements (Judge). Ex parte Queen Anne's Bounty	Times Newspapers, July 28, 1933, p. 3	424
—— *v.* Customs & Excise Commissioners	[1913] 3 K. B. 483	449
—— *v.* Electricity Commissioners. Ex parte London Joint Committee	[1924] 1 K. B. 171	30
—— *v.* Minister of Health. Ex parte Davis	[1929] 1 K. B. 619	37
—— *v.* North. Ex parte Oakey	[1927] 1 K. B. 491	424
—— *v.* North East Surrey Assessment Committee. Ex parte Woolworth (F. W.) & Co.	[1933] 1 K. B. 776	627
—— *v.* North Worcestershire Assessment Committee	[1929] 2 K. B. 397	628
—— *v.* Pomfret (Earl)	5 M. & S. 139	319
—— *v.* St. Austell (Inhabitants)	5 B. & Ald. 693	319
—— *v.* Shoreditch Assessment Committee	[1910] 2 K. B. 859	449, 450
—— *v.* Taylor and Amendt	[1915] 2 K. B. 593	449
Roach *v.* Garvan. *See* Perry's Case.		
Robbins *v.* Jones	15 C. B. (N. S.) 221	54
Roberts *v.* Barnard	Cab. & E. 336	385
——— *v.* Death	8 Q. B. D. 319	111
Robinson *v.* Kilvert	41 Ch. D. 88.	472
———— *v.* State of South Australia	[1931] A. C. 704	243
Rogers *v.* Whiteley	[1892] A. C. 118	112

		PAGE
Roots *v.* Dormer (Lord)	4 B. & Ad. 77	249
Rorke *v.* Errington	7 H. L. C. 617	264
Roundwood Colliery Co., In re	[1897] 1 Ch. 373	320
Ruabon Brick & Terra Cotta Co. *v.* Great Western Ry. Co.	[1893] 1 Ch. 427	22
Russell *v.* Town & County Bank	13 App. Cas. 418	652

S.

St. Helen's Colliery Co. *v.* Hewitson	[1924] A. C. 59	92, 557
"St. James's Evening Post" and "Champion" Case: Roach *v.* Garvan	2 Atk. 469; S. C. Dick, 794	595, 598
Salisbury (Marquis of) *v.* Gladstone	6 H. & N. 120	22
Salveson *v.* Austrian Property Administrator	[1927] A. C. 641	508
Samuel *v.* Inland Revenue Commissioners	[1918] 2 K. B. 553	536
Scarisbrick *v.* Parkinson	20 L. T. 175	405
Shanks *v.* Inland Revenue Commissioners	[1929] 1 K. B. 342	525
Sharp, In re	[1906] 1 Ch. 793	536
Sharpe *v.* Sharpe	[1909] P. 20	508
Sheffield Coal Company's Case	Unreported	27
Shrewsbury Estate Acts, In re. Shrewsbury *v.* Shrewsbury	[1924] 1 Ch. 315	582
——— *v.* Shrewsbury. In re Shrewsbury Estate Acts	[1924] 1 Ch. 315	582
Shuttleworth *v.* Leeds Greyhound Association, Ld.	[1933] 1 K. B. 400	544
Slingsby *v.* Att.-Gen.	[1918] P. 236	140
Smith *v.* Birmingham Churchwardens	22 Q. B. D. 211	287
——— *v.* Martin & Kingston-upon-Hull Corporation	[1911] 2 K. B. 775	12
——— *v.* New Forest Union	54 J. P. 324	524
——— *v.* Schilling	[1928] 1 K. B. 429	553
——— *v.* Seghill	L. R. 10 Q. B. 422	651
Smith's Estate, In re. Clements *v.* Ward	35 Ch. D. 589	30
Société des Hôtels Réunis (Société Anonyme) *v.* Hawker	58 Sol. Jo. 515; 30 Times L. R. 423	223
Stewart *v.* Thames Conservators	[1908] 1 K. B. 893	40
Stoke-on-Trent Borough Council *v.* Cheshire County Council	[1915] 3 K. B. 699	301
Stoker *v.* Wortham	[1919] 1 K. B. 499; 12 B. W. C. C. 34	337
Sugden *v.* Leeds Corporation	[1914] A. C. 483	63, 189
Sutton *v.* Inland Revenue	14 Tax Cas. 662	654
Swiss Bank Corporation *v.* Boehmische Industrial Bank	[1923] 1 K. B. 673	112

T.

Tarling *v.* Rome	52 Times L. R. 220	478
Tayler *v.* Great Indian Peninsula Ry. Co.	4 De G. & J. 559	105
Taylor *v.* Lock (No. 1)	142 L. T. 537; 23 B. W. C. C. 55	335, 346
——— *v.* McAlpine (Sir Robert) & Sons, Ld.	17 B. W. C. C. 26	574

		PAGE
Tennant *v.* Smith	[1892] A. C. 150; 3 Tax Cas. 158	645, 652
Thames & Mersey Marine Insurance Co. *v.* British & Chilian Steamship Co.	[1915] 2 K. B. 214	123
Thomas *v.* Moore	[1918] 1 K. B. 555	478
——— *v.* Ocean Coal Co.	[1933] A. C. 100; 25 B. W. C. C. 436	336
——— *v.* Sawkins	[1935] 2 K. B. 249	436
Tollemache (Lord) *v.* Inland Revenue	11 Tax Cas. 277	654
Tottenham's Estate, In re	3 Ir. R. Eq. 528	264
Trollope & Sons *v.* Martyn Brothers	[1934] 2 K. B. 436	382
Turner *v.* Thompson	13 P. D. 37	508

V.

Vera Cruz, The (No. 2)	10 App. Cas. 59	37

W.

Waddle *v.* Sunderland Union	[1908] 1 K. B. 642	449
Ward, In re. Harrison *v.* Ward	[1922] 1 Ch. 517	507
——— *v.* British Oak Insurance Co.	[1932] 1 K. B. 392	259
Waring *v.* Foden	[1932] 1 Ch. 276	22
Warren *v.* Hedley's Colliery	6 B. W. C. C. 136	334
Waugh *v.* Morris	L. R. 8 Q. B. 202	133
Webster *v.* Webster	[1916] 1 K. B. 714	167
West *v.* Gwynne	[1911] 2 Ch. 1	259
White *v.* Bembridge	[1935] 1 K. B. 244	6
William Thomas Shipping Co., In re	[1930] 2 Ch. 368	595
Williams *v.* North's Navigation Collieries, 1889, Ld.	[1906] A. C. 136	200
Wilsons and Clyde Coal Co., Ld. *v.* M'Ferrin	[1926] A. C. 377; 19 B. W. C. C. 1	343
Winstanley *v.* North Manchester Overseers	[1910] A. C. 7	524
Wombwell's Settlement, In re	[1922] 2 Ch. 298	507
Woolf *v.* East Nigel Gold Mining Co.	21 Times L. R. 660	407
Woolworth (F. W.) & Co., Ex parte. Rex *v.* North East Surrey Assessment Committee	[1933] 1 K. B. 776	627

Y.

Yonge *v.* Toynbee	[1910] 1 K. B. 215	422
Young *v.* Merchants' Marine Insurance Co.	42 Ll. L. 134; Affd. [1932] 2 K. B. 705; 43 Ll. L. 277	465
Ystradyfodwg & Pontypridd Main Sewerage Board *v.* Bensted	[1907] A. C. 264	530

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

BURGOYNE *v.* ROSE BRIDGE COLLIERY COMPANY, LIMITED.

C. A.
1936
April 1, 2.

Workmen's Compensation—Medical Referee—Certificate—County Court Registrar remitting certificate for further answer—Jurisdiction of Registrar—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 19—*Workmen's Compensation Rules,* 1926, *r.* 57.

The functions of a county court registrar in connection with a reference to a medical referee under the Workmen's Compensation Act, 1925, and the Workmen's Compensation Rules, 1926, are purely ministerial. He has no jurisdiction to consider whether the questions put to the medical referee have been properly answered, or to remit the certificate for further answer.

APPEAL from the deputy county court judge of Wigan County Court.

The applicant workman, who was in the service of the respondents as a dataller, was injured in the course of his employment by a piece of metal or coal striking his eye. In respect of this he claimed and was paid compensation for some time. Later, the respondents served upon him a notice containing a certificate from their doctor which stated that the applicant had recovered from the effects of the accident. The applicant served a counter notice on the respondents disputing this statement of the respondents' doctor. Thereafter the parties agreed that certain questions should be submitted to the medical referee for determination, and an application for this purpose was made to the registrar under r. 57 of the Workmen's Compensation Rules, 1926. The questions then submitted to the medical referee were as follows: "(1.) Whether or not the said Samuel Burgoyne has recovered from the effects of the accident; (2.) whether or not he is fit to resume his original employment as a dataller; and (3.) if he is not so fit specify the kind of work he is capable of performing and particularly whether the incapacity is due to the accident or is due to other causes." To these questions the medical referee returned the following answers so far as material: "He is not fit to resume his original employment as a dataller but is fit for light work on the surface. The incapacity is partially due (but only slightly) to the accident and is mainly due to other causes not attributable to the accident." On receiving this certificate the registrar of the county court, taking the view that the answers did not conclude the question whether the applicant had recovered and whether his incapacity was due to the accident or was due to other causes, sent the certificate back to the medical referee without consulting or communicating with the parties, and asked what work the applicant was fit for, whereupon the medical referee added to his original certificate these words: "If the man were only suffering from the slight incapacity resulting from the accident he would be fit for his ordinary work as a dataller." On this expanded certificate coming before the deputy county court judge at the resumed hearing he held that it was conclusive and binding upon him, and accordingly he held that the applicant was no longer entitled to compensation.

The applicant appealed.

H. I. Nelson for the appellant. The registrar had no jurisdiction to put the supplementary question to the medical referee, and therefore the certificate must be read without the added answer.

Cave K.C. and *Fraser Harrison* for the respondents. The medical referee misunderstood the question put to him and merely had his attention called to the fact. Suppose the referee omitted something, there can be nothing wrong in pointing this out to him. That is what the registrar did.

[GREENE L.J. The registrar framed a subsidiary question. One of the parties may have wanted to add to or modify it ; but no opportunity for doing this was afforded.]

The registrar merely asked the medical referee to elucidate his answers. No doubt if he had done more than that he would have been exceeding his jurisdiction.

SLESSER L.J. This is an appeal from a judgment of the deputy county court judge in which the applicant, who had been in the service of the respondents as a dataller, claimed compensation in respect of an injury sustained by him in the course of his employment. After being paid compensation for a time, the employers served upon him, under s. 12 of the Workmen's Compensation Act, 1925, a notice containing a certificate which stated that in the opinion of the employers' doctor he had recovered. The workman served a counter certificate which disagreed with the view expressed by the employers' doctor. Thereupon the parties agreed that certain questions should be submitted to the medical referee for determination under s. 19, and an application was made to the registrar under r. 57, the questions agreed upon being these : [His Lordship read the questions and answers and continued :] With those answers the medical referee's certificate was returned to the registrar, whose duty thereupon was, as set out in r. 57, para. 8, to " inform the parties by post that it has been received, and shall permit any party to inspect the same during office hours, and shall on the application and at the cost of either party furnish him with a copy of the certificate, or allow him to take a copy thereof." The certificate purported to be made under the Act, and in terms it deals with the questions submitted; but the registrar took the view, a view which I share, that the answers did not conclude the question whether the workman had recovered from the effect of the accident and whether his incapacity was due to the accident or to other causes, and thereupon he took it upon himself, without consultation or communication with the parties, to send to the medical referee a request that he would certify what work the workman was fit for if he were only suffering from the slight incapacity resulting from the accident. In my opinion the registrar in so doing was acting without jurisdiction. It is true that under r. 57 of the Workmen's Compensation Rules there are certain matters as to which the registrar has to perform judicial or quasi-judicial functions, but with regard to sending the questions to the medical referee and in dealing with his certificate on receiving it back his function is purely ministerial. On receiving the certificate from the medical referee it was not for the registrar to consider whether the questions were or were not properly answered; his duty was simply to inform the parties of its receipt and to allow inspection; much less had he power to suggest, as he did, the kind of question which the medical referee was required to answer. The registrar asked what work the man would be fit for, a very pregnant and probably very useful question, but one which he had no jurisdiction to formulate. I do not deal with this case merely on the ground that the registrar put that specific question to the medical referee, I deal with it on the footing that he had no jurisdiction to inquire into the adequacy of the answer or to endeavour to correct any inadequacy. These are judicial functions. The importance of strictness in these matters is made clear by a consideration of s. 19 of the Act, which provides that the certificate of the medical referee "as to the condition of the workman and his fitness for employment, specifying where necessary, the kind of employment for which he is fit," is to be conclusive evidence as to the matters so certified; and there are decisions showing that when the requirements of the certificate have been complied with they are binding on the Court. Therefore nothing should be done with regard to this certificate, which has such evidential importance, than what is expressly provided for in the Act, and no one in a position like the registrar can arrogate to himself duties which are not conferred upon him by the Act. The registrar, as I have said, made the request without authority from the parties. Had there been authority from them a different question might have arisen. The medical referee as appears from the certificate, on this invitation, added to what he originally wrote the following words: "If the man were only suffering from the slight incapacity resulting from the accident he would be fit for his ordinary work as a dataller." Under s. 19 the certificate is conclusive evidence as to the matters certified, but only those matters can be certified which have been properly referred to the medical referee. As this certificate has had added to it something which had no right to be there, and as the deputy county court judge held himself bound by the certificate with what may be called this noxious addition, it follows that he was wrong. Without the extra words the certificate is indecisive. On more than one occasion this Court has sent back a certificate to the medical referee that he may explain what he means, and that we propose to do in the present case with a question which we shall formulate.

GREENE L.J. I agree. The terms of the reference to the medical referee in this case were not confined to the rather bald questions mentioned in s. 19 of the Act and in the relevant form No. 49, but by consent certain questions, subsidiary or explanatory, were formulated which the parties desired to be answered. When the certificate came from the medical referee the registrar considered that it did not fully and completely answer those questions, and accordingly he formulated a further question in order to elicit a full answer. The jurisdiction of the medical referee being based on consent

C. A.
1936
BURGOYNE v. ROSE BRIDGE COLLIERY CO.
Greene L.J.

of the parties they are entitled to have put before him the questions which they have agreed. It may be that parties, though designating the questions, may object to the wording or may require a supplementary question to be put in order to clear up certain points; but if any supplementary question is to be put it is not for the registrar, however benevolent his action may be, to frame it. It will be for the county court judge to satisfy himself whether any answer is ambiguous or not. If he considers it ambiguous he can send it back; it is not for the registrar to do so. I agree that the question itself that was put does not go beyond the scope of the original question, and on that ground it has been argued that the county court judge was entitled to treat the supplementary answer as part of the certificate. That argument in my opinion is untenable, inasmuch as the registrar had no jurisdiction to formulate the question.

SCOTT L.J. I agree. *Appeal allowed.*

Solicitors for appellant: *Burn & Berridge, for James Wilson & Kinsey, Wigan.*

Solicitors for respondents: *Gregory, Rowcliffe & Co., for Peace & Ellis, Wigan.*

J. S. H.

C. A.
1936
April 28.

HEGINBOTTAM *v.* WATTS.

Landlord and Tenant—Rent Restriction—Dwelling-house—Rateable value under 20l.—Decontrol—Onus of proof—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 1, *sub-s.* 2.

Since the passing of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the onus lies upon the tenant of a dwelling-house of showing that the house is still controlled, even though the rateable value of the house is less than 20*l.* a year, and not upon the landlord of showing that the house has been decontrolled.

White v. *Bembridge* [1935] 1 K. B. 244 followed and applied.

APPEAL from a decision of the judge of the Willesden County Court.

The plaintiff was the owner of a house No. 67 Carlton Vale, N.W.6, one room of which was let to the defendant at a rent of 4*s.* a week.

The plaintiff served a week's notice to quit upon the defendant, which was not complied with.

The plaintiff then took out a summons in the Willesden County Court claiming possession of the room.

At the hearing of the summons evidence was given on behalf of the plaintiff as to the weekly tenancy of the defendant, and the service of the notice to quit, and the certificate of the decontrol of the dwelling-house, which had been registered by the plaintiff's predecessor in title, was put in, and it was submitted that on that evidence the plaintiff was entitled to judgment. The county court judge then took the point that the burden of proving that the dwelling-house had been decontrolled was on the plaintiff.

It was contended on behalf of the plaintiff that since the passing of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the onus of proving that the house was still controlled was on the tenant, and the decision of the Court of Appeal in *White* v. *Bembridge* (1) was relied upon.

The county court judge held that the principle laid down in *White* v. *Bembridge* (1) did not apply in the case of a class C house—namely, a house whose rateable value was under 20*l.* a year, and that the onus of showing that a house of that class had been decontrolled was on the landlord, and that as the plaintiff had failed to show that the house had been decontrolled he gave judgment for the defendant at the close of the plaintiff's case without calling upon the defendant.

The plaintiff appealed.

Heathcote-Williams and *L. A. Blundell* for the appellant. There is a difference in the phraseology of the Rent Restrictions Acts of 1920 and 1933. Sect. 12, sub-s. 2, of the Act of 1920 provides that: "this Act shall apply to a

(1) [1935] 1 K. B. 244.

house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" a specified amount, whereas s. 1, sub-s. 2, of the Act of 1933 provides that as from September 29, 1933, "the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house, and it is also a dwelling-house of which either the annual amount of the recoverable rent on the appointed day or the rateable value on the appointed day did not exceed" a specified amount. Lord Hanworth M.R. in *White* v. *Bembridge* (1) said: "In order that the principal Acts shall continue to apply, the conditions in the proviso must be complied with. It is plain that the opening words of the sub-section—namely, that the principal Acts shall not apply, are an over-riding statement of the law, and restore the relationship of landlord and tenant to the contract made between them unless the tenant can establish that the case falls within the proviso." No distinction was drawn in that case between houses in classes A, B or C. In every case the burden of showing that the Rent Restriction Acts shall apply to a dwelling-house is now on the tenant, and the landlord does not have to prove that the house has been decontrolled.

The respondent did not appear and was not represented.

GREER L.J. Unfortunately, in this case the respondent is not represented, and we have not had the benefit of hearing any argument on his behalf. The contention for the appellant is that the learned county court judge ought to have made an order for possession, because the tenant did not prove what it is contended is for him to prove—namely, that immediately before the Act of 1933 this was a controlled house, and also that he did not prove what its rateable value was, or what its rent had been; and although I have hesitated in thinking that the Legislature intended to put the burden on an occupying tenant of premises which were let at 4s. a

(1) [1935] 1 K. B. 247.

week of establishing that the premises had never been decontrolled by reason of some previous landlord going into actual possession, or for some other reason, still, I think we must treat the decision in *White* v. *Bembridge* (1) as based upon the reasons given by the Master of the Rolls in his judgment, and so treating it, I think we are bound to say that in this case the tenant did not comply with the burden of proof which is put upon him by the Act of 1933 as interpreted by the Court of Appeal in *White* v. *Bembridge*. (1) Therefore this appeal should be allowed.

GREENE L.J. I agree. I do not think it would be possible to decide this case otherwise without departing from the principles laid down in *White* v. *Bembridge*. (1) In that case Lord Hanworth M.R. states (2) the principle with regard to the effect of s. 1, sub-s. 2, of the Act of 1933 in quite general terms. What he says is this: "It is plain that the opening words of the sub-section—namely, that the principal Acts shall not apply, are an overriding statement of the law, and restore the relationship of landlord and tenant to the contract made between them unless the tenant can establish that the case falls within the proviso." Now, it is perfectly true that in that case the particular limb of the provision in question with which the Court was concerned was the limb referring to rateable value, and in that case the tenant failed to discharge the burden of proof which was upon him in regard to that particular matter. But the language of the Master of the Rolls, as I read it, draws no distinction between that limb, which deals with rateable value and rent, and the other limb, which deals with the application of the Act to the dwelling-house immediately before the passing of the Act of 1933—and he states it quite generally that the burden of proof is on the tenant to establish that the case falls within the proviso, and by that I think he means that unless the tenant can establish all the circumstances laid down in the sub-section as necessary to make that Act apply, the landlord is entitled to succeed. The effect of reading the sub-section is

(1) [1935] 1 K. B. 244.

(2) Ibid. 247.

C. A.
1936

HEGINBOTTAM v. WATTS.

Greene L.J.

(if one can put it into sub-heads in this way) that as from the 29th day of September, 1933, the principal Acts shall not apply to any dwelling-house unless (*a*) it is a dwelling-house to which they applied immediately before the passing of this Act, and (*b*) that it is also a dwelling-house of which either the rent or the rateable value does not exceed so much. If the sub-section be dealt with in that way it would not be possible, I think, consistently with logic, to say that the burden of proof under the head I have called (*b*) should be on the tenant, and that the burden of proof under the head I have called (*a*) should be on the landlord. In my opinion the authority of *White* v. *Bembridge* (1) covers this case, and the appeal is entitled to succeed.

TALBOT J. I agree, and have nothing to add.

GREER L.J. The appeal will be allowed, but inasmuch as the learned county court judge decided the case at the conclusion of the plaintiff's case without hearing the defendant there must be an order for a new trial.

Appeal allowed.
Order for new trial.

Solicitors for appellant: *Seaton & Co.*

R. F. S.

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(1) [1935] 1 K. B. 244.

STRANGWAYS-LESMERE *v.* CLAYTON.

1936
Feb. 27, 28;
March 2, 6.

Negligence—Nurses—Hospital—Operation—Administration of drugs—Relation of hospital to patient.

The plaintiff's wife, who had been admitted to the W. hospital to undergo an operation, lost her life owing to an overdose of a dangerous drug administered to her just before the operation by two nurses at the hospital. The overdose was due to a mistake on the part of the nurses in reading the amount ordered by the doctor to be administered. The plaintiff brought an action for damages under the Fatal Accidents Acts, and the Law Reform (Miscellaneous Provisions) Act, 1934, against (*a*) the nurses and (*b*) the hospital authority:—

Held, that the nurses were guilty of negligence and were liable, but that the hospital authority was not liable as principals for the nurses' negligence, the only duty resting on the hospital being to see that the nurses who were engaged were duly qualified.

ACTION tried before Horridge J. without a jury.

The plaintiff claimed damages for the loss of his wife, who died under an operation at the Weymouth and District Hospital on May 9, 1935, and whose death was caused, as he alleged, by the negligence of the defendants Miles and Chapman, two staff nurses at the hospital. He also sued the defendant Clayton and other members of the general committee and the trustees of the hospital, alleging that the hospital authority was liable for the negligence of their nurses in that they failed to exercise proper supervision in the administration to his wife of a dangerous drug called paraldehyde prior to the operation upon her.

By their defence, nurse Miles and nurse Chapman denied negligence, and by a separate defence the hospital authority denied that the two nurses were their servants or agents in administering the drug. Alternatively, the hospital authority pleaded that all reasonable care had been taken to ensure the competence of persons attending the deceased lady in the hospital.

The facts are fully set out by Horridge J. in the course of his judgment.

Tom Eastham K.C. and *R. C. Essenhigh* for the plaintiff. The evidence shows clearly that the nurses here were negligent in their reading of the directions as to the administration of the drug and in not checking the amount to be administered with the amount stated on the bed-board. The hospital is liable; for the committee make rules for the conduct of the nurses and are in the direct relation to them of master and servant. It is only when the nurses are under the control of doctors in the course of an operation that the liability of the hospital ceases. Then they fall under the control of the doctors who direct them.

In *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) Kennedy L.J. says that the hospital is not liable in matters of professional skill in which the governors neither do nor can properly interfere, either by rule or supervision. But in other matters the hospital is liable, as the employer, for the nurses' acts. The act of the nurses in administering the drug was within the ordinary scope of their employment by the hospital, and for that act the hospital, as the employer, is liable: *Smith* v. *Martin and Kingston-upon-Hull Corporation.* (2)

In conclusion, the hospital authorities were themselves negligent in not putting up a notice directing nurses to refer to the sister in charge or otherwise to check doses, before administering dangerous drugs.

T. Carthew K.C. and *N. R. Fox-Andrews* for the hospital authority. The duty of the hospital towards the patient is to use due care and skill in selecting the staff: *Hillyer* v. *Governors of St. Bartholomew's Hospital.* (3) Having done that they are not liable for negligent acts on the part of either doctors or nurses. Nurses are not under the orders or bound to obey the directions of the hospital authority. As Lord Collins (then Master of the Rolls) said in *Hall* v. *Lees* (4): " The nurse is not put in the place of the association to do an act which they intended to do themselves." (They cited also *Evans* v. *Liverpool Corporation* (5) and *Lavelle* v.

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(1) [1909] 2 K. B. 820, 829.
(2) [1911] 2 K. B. 775.
(3) (1909) 2 K. B. 820.
(4) [1904] 2 K. B. 602, 615.
(5) [1906] 1 K. B, 160,

Glasgow Royal Infirmary. (1)) The extent of the liability of the hospital authority for their servants' acts is laid down by Kennedy L.J. in *Hillyer's* case (2) and it is confined to their "purely ministerial or administrative duties." This passage is cited with approval by Greer L.J. in *Marshall* v. *Lindsey County Council.* (3) In *James* v. *Probyn* (4) negligence was alleged against a nurse at a Folkestone hospital in that she had left a tube in the patient's body after an operation, and Swift J. held that there was no case to go to the jury as against the hospital authority, because the nurses were skilled persons controlled by the managers of the hospital. The hospital here is not responsible even if negligence is established against the two nurses. The nurses are skilled persons, who cannot be controlled in their actions by the hospital authority.

J. D. Casswell for the two nurses.

Tom Eastham K.C. in reply. As to *James* v. *Probyn* (4) Swift J. stopped the case and held that there was no evidence to go to the jury. That case is in no way parallel to the present, and the position of a nurse is entirely different from that of a medical man, whom the hospital has no right to direct.

Cur. adv. vult.

1936. Mar. 6. HORRIDGE J. read the following judgment. In this case the plaintiff sues for damages in respect of the death of his wife, which he alleges was caused by the negligence of the defendants Miles and Chapman, and he also alleges that the other defendants, the hospital authority, are responsible.

On May 2, 1935, the plaintiff's wife was admitted to the Weymouth and District Hospital for the purpose of undergoing an operation for which the plaintiff contracted to pay. On May 6, 1935, Dr. Markby, the house surgeon, on the instructions of Mr. Horton, the plaintiff's surgeon, wrote out on what is called the bed card instructions as to the preparation of the patient for the operation. He there stated that 6 drachms, which were indicated by a recognized symbol, of paraldehyde were to be administered at 8.30 o'clock and at the same time he stated the quantity of atropine which was also to be administered. He decided, however, that the administration of paraldehyde was to be given at 8 o'clock and not at 8.30 and he communicated this to sister Campbell, who was the day sister in charge. Sister Campbell, according to her evidence, communicated to sister Damon, that the patient was to have 6 drachms of paraldehyde in 9 ounces of water to be administered per rectum at 8 o'clock and that she would notice the time on the bed card was 8.30 but that related only to the atropine. Sister Damon says that she wrote out on a piece of paper the instructions that the paraldehyde was to be 6 drachms in 9 ounces of water at 8 o'clock and also stated, " Please see bed card for atropine 8.30." She handed this to nurse Miles, who looked at the bed card and saw that the time for administering the paraldehyde was 8.30. Nurse Miles then returned to sister Damon about the matter and sister Damon told her these were the sister's instructions and the time had been altered. Nurse Miles did not look at the bed card to see the quantity of paraldehyde which was to be administered. Nurse Miles said she did not do this because the piece of paper had on it not 6 *drachms* but 6 *ounces* of paraldehyde, and as to this she was corroborated by nurse Chapman. Nurse Miles then poured out the dose of 6 ounces of paraldehyde and nurse Chapman checked this, but neither of them looked at the bed card. Sister Campbell says that on the following morning she saw this slip of paper and she is quite certain that sister Damon had put upon it 6 drachms and not 6 ounces. I have, therefore, after seeing the witnesses, to decide the question as to what was on the slip of paper, and I have come to the conclusion that I must accept the evidence of sister Campbell and sister Damon that what was written on the paper was 6 drachms and not 6 ounces, and that both nurse Miles and nurse Chapman were guilty of negligence, the unfortunate result of which was that the patient died without recovering consciousness. In my view both these nurses were guilty of negligence even if sister Damon had written ounces. Nurse Miles had looked at the bed card and if she had been careful she must have seen that the paraldehyde bracketed with the atropine was there stated to be 6 drachms. I am further of opinion that both these nurses ought to have looked at the bed card in measuring out the dose, in which case they would have seen that it was not 6 ounces but 6 drachms. I am also of opinion that nurse Miles was guilty of negligence because on the bottle containing the paraldehyde the ordinary dose by the mouth was stated to be half to two fluid drachms, and she admitted she knew when administered by the rectum the quantity would be at the most three times that when administered by the mouth, whereas the dose she administered was very considerably more than this. I am therefore of opinion that both the nurses are liable in this action.

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(1) 1932 S. C. 245.
(2) (1909) 2 K. B. 820.
(3) [1935] 1 K. B. 516.
(4) Unreported. See The Times, May 29, 1935.

The further question remains whether the hospital authorities are liable for the acts of either of these two nurses and I am of opinion that they are not.

The administration of the paraldehyde is a skilled operation, and though it is quite true that there was a practice in the hospital that all administrations of dangerous drugs should be checked, yet I do not think the hospital authorities undertook in any way themselves to administer the doses, but that the nurses in doing that were doing their own work as skilled nurses and not as servants of the hospital authorities. I had a number of cases cited to me, but the one which gave me the most assistance was *Hillyer* v. *Governors of St. Bartholomew's Hospital.* (1) In that case Kennedy L.J. points out some cases in which the hospital would or would not be liable, and that passage in his judgment is referred to by Greer L.J. in *Marshall* v. *Lindsey County Council.* (2)

Kennedy L.J. says (3): "But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently

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(1) [1909] 2 K. B. 820.

(2) [1935] 1 K. B. 516, 518.

(3) [1909] 2 K. B. 829.

1936

STRANG-WAYS-LESMERE v. CLAYTON.

Horridge J.

towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants."

In the same case Farwell L.J. says (1): "The contract of the hospital is not to nurse during the operation, but to supply nurses and others, in whose selection they have taken due care. The relation of the hospital to the patient in respect of nurses and attendants supplied by the former for an operation on the latter is the same as that of the Association of Nurses to the patient supplied by them with a nurse, as decided by this Court in the case of *Hall* v. *Lees*. (2) I take the test applied by Lord Collins, then Master of the Rolls: 'They are not put in his place to do an act which he intended to do for himself.' The nurses and attendants are not put in the place of the hospital to do work which the governors of the hospital intended to do themselves, because they had not undertaken to operate or assist in operating, but only to supply qualified persons to act as nurses and assistants under the control of the operating surgeon."

I do not think this is a matter of a nurse's routine, but one in which she is to use professional skill, and the only

(1) [1909] 2 K. B. 820, 826.

(2) [1904] 2 K. B. 602, 615.

duty on the hospital is to see that the nurses they engage are duly qualified persons. This was not work which nurse Miles was put in the place of the hospital authority to do, or work which the authority intended to do themselves.

In the recent case of *James* v. *Probyn* (1), decided by Swift J. on May 28, 1935, of which I have been supplied with the shorthand note, the learned judge lays it down after referring to *Marshall* v. *Lindsey County Council* (2): "Based upon the decisions which have been cited to me and which I have just quoted, the Committee of the Hospital contracts with a patient who is going in there that they will provide a hospital, that is to say, an appropriate building suitable for the purpose of a hospital with a domestic staff for the purpose of running the hospital whom they will control for the purpose of running the hospital. They also contract that they will employ or engage competent doctors and competent nurses, but I do not think that they undertake in any way to be responsible for the way in which the doctors or the nurses perform their duties. The duties of doctors and nurses are the duties of skilled people to be carried out by skilled people, and the actions of doctors and nurses cannot be controlled in my opinion by members of a Committee who do not for one moment pretend that they have the knowledge or the ability to perform these duties themselves. They do not seem to me to be there as the servants of the Committee at all in the sense that the Committee can control their method of carrying out their work. That being so, they are not responsible for any negligence of which they may be guilty in the way in which they do carry out their work."

A point was made by Mr. Eastham, on behalf of the plaintiff, that as it was admitted there was a practice in the hospital as to the checking of doses of dangerous drugs, a notice ought to have been put for the nurses to see, prescribing the practice which was (as is described by the matron) that all the drugs should be checked by the sister or her deputy. If this had been done in this case and if nurse Miles had gone to sister Damon to check the dose, in all probability the

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(1) Unreported.

(2) [1935] 1 K. B. 516.

1935

STRANG-WAYS-LESMERE
v.
CLAYTON.

Horridge J.

mistake would have been discovered. Nurse Miles and nurse Chapman both said that they were unaware of the necessity of a check by the sister in charge or her deputy, and that was why nurse Miles got nurse Chapman, who was considerably senior to herself, to check the dose. The question I have to decide is whether the omission to publish notices as to checking by the sister in charge or her deputy is negligence on the part of the hospital authority. There was no evidence before me that any other hospital put up such notices, but the evidence was that the checking was a well known practice and this practice was in operation in this hospital. On the whole, I have come to the conclusion that I cannot rightly say that the omission to put up printed notices was an act of negligence for which the hospital authorities are responsible. The damages in this case were agreed at 100*l.*

There must be judgment for the plaintiff against the defendants Miles and Chapman for 100*l.*, and judgment for the other defendants.

Solicitors for the plaintiff: *Litchfield & Kusel*, for *K. Kusel*, Weymouth.

Solicitors for the defendants: *W. C. Crocker*; *Williamson, Hill & Co.*, for *Sir A. Pengilly*, Weymouth.

F. P. F.

[RAILWAY AND CANAL COMMISSION COURT.]

1936
March 18.

HODDESDON URBAN DISTRICT COUNCIL *v.* BROXBOURNE SAND AND BALLAST PITS, LIMITED.

HERTFORDSHIRE COUNTY COUNCIL *v.* THE SAME.

Highway—Footpath—Extinction or diversion—Sand and gravel pit—Ancillary right—Facility—Jurisdiction of Railway and Canal Commission—Mines (Working Facilities and Support) Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *ss.* 3, 13.

The Railway and Canal Commission has no jurisdiction to make an order extinguishing or diverting a footpath as an ancillary right under s. 3 of the Mines (Working Facilities and Support) Act, 1923. The procedure to be followed in extinguishing or diverting public footpaths is laid down in ss. 84 and 85 of the Highway Act, 1835, and there is no concurrent or alternative procedure under the Act of 1923.

PRELIMINARY points of law under r. 45 of the rules of the Railway and Canal Commission, arising out of an application under the Mines (Working Facilities and Support) Act, 1923.

The application was made by the Broxbourne Sand and Ballast Pits, Ld. (referred to hereafter as " the applicants "), for the extinction or diversion or the lowering of the public footpath. The applicants alleged that they had the right to work, and were working, sand and gravel at a quarry, and that their right to work the minerals was derived under a lease dated June 30, 1933, of a field across which the public footpath in question ran. The applicants suggested that certain alternative routes across their field would be equally convenient for the public and more commodious, or, in the event of the right to lower the surface of the footpath being granted to them, the applicants were willing to provide for easy access to the lower level. They alleged that the proper and efficient working of the minerals was unduly hampered by the absence of the right applied for.

The objectors, the Hoddesdon Urban District Council, said that the footpath mentioned in the application was a highway within the meaning of the Highway Act, 1835 (5 & 6 Will. 4,

c. 50), s. 3, and the objectors were the local authority in whom were vested the powers and duties in relation to highways within the urban district of Hoddesdon, by virtue of the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 5, 6 and 144; the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21, sub-s. 1; the Local Government Act, 1933 (23 & 24 Geo. 5, c. 51); and the Broxbourne and Hoddesdon Open Spaces and Recreation Grounds Act, 1890 (53 & 54 Vict. c. xlvii). The objectors said that in so far as the application was for the extinction or diversion of the footpath, the procedure laid down in s. 84 of the Highway Act, 1835, must be followed.

The objectors further said that they were entitled to have the footpath maintained uninjured at its natural level notwithstanding any right there might be in the applicants or their lessor or in some other person to the minerals thereunder or to work such minerals; that the right applied for—namely, the extinction, diversion, or lowering the footpath—was not a right to work, or an ancillary right within the meaning of the Act of 1923, and that therefore the Railway and Canal Commission had no jurisdiction to entertain the application.

The objectors denied that the sand and gravel mentioned in the application were minerals within the meaning of the Mines (Working Facilities and Support) Act, 1923, and, accordingly, they would contend that the Commission had no jurisdiction to entertain the application or to grant the right applied for. They alleged that the sand and gravel constituted the ordinary rock and soil of the district and was in no sense exceptional.

A summons was issued to have the foregoing objections tried as preliminary points of law under r. 45 of the rules of the Railway and Canal Commission. On an application made on behalf of the Hertfordshire County Council, leave was obtained to amend the summons to join that authority with the Hoddesdon Urban District Council as objectors.

David Bowen for the objectors. The Commission is asked to try preliminary points of law arising out of an application

1936

HODDESDON U. D. C. v. BROXBOURNE SAND AND BALLAST PITS, LD. HERTFORDSHIRE COUNTY COUNCIL v. THE SAME.

by the Broxbourne Sand and Ballast Pits, Ld., under s. 3 of the Mines (Working Facilities and Support) Act, 1923, for an ancillary right involving, in the working of sand and gravel on their land, the extinction or diversion of the surface of a public footpath. One of the questions to be decided is whether the Railway and Canal Commission has jurisdiction, under the Act of 1923, to grant the ancillary right asked for by the applicants in this case. The footpath in question in this case is a public highway within the meaning of the Highway Act, 1835, and if it is desired to extinguish or divert the footpath the procedure laid down in ss. 84 and 85 of the Act of 1835 must be followed. First of all, the consent of the local authority must be obtained. The refusal by the local authority of its consent to the extinction or diversion of the footpath is final. But if the local authority consent, then there must be a certificate by two justices of the peace followed by a confirmation by quarter sessions. The Railway and Canal Commission has no concurrent jurisdiction with the local authority, the justices and quarter sessions, to make an order under s. 3 of the Act of 1923 which would have the effect of extinguishing or diverting a public highway. The applicants in this case are, in effect, asking the Commission to take away powers which Parliament in the Highway Act, 1835, delegated to three bodies of persons for the protection of public rights—namely, (1.) the local authority, who are immediately concerned, (2.) two local justices of the peace, and (3.) quarter sessions. These three bodies of persons are locally interested in the protection of the rights, not only of the public at large, but particularly the rights of local inhabitants. There are no express words in the Act of 1923 giving the Commission jurisdiction to close or divert public rights of way. It is a very strong thing to suggest that there has crept into the Act of 1923, by implication, a right to the Commission to do what Parliament has expressly provided must be done in accordance with the procedure laid down in the Highway Act, 1935. Moreover, s. 13 of the Mines (Working Facilities and Support) Act, 1923, is designed to protect the existing rights of local authorities. A local

1936

HODDESDON U. D. C. v. BROXBOURNE SAND AND BALLAST PITS, LD. HERTFORDSHIRE COUNTY COUNCIL v. THE SAME.

authority, in respect of a public highway, is entitled to have that highway supported at its natural level and s. 13 expressly provides that such a right of support shall not be taken away. Another right vested in the local authority which is protected by the section is the right to prohibit an extinction or a diversion of a public right of way.

A further question arises whether the right applied for, that is the extinction, diversion, or the lowering of the surface of the public footpath, is a right to work, or an ancillary right within the meaning of s. 3 of the Act of 1923. It is submitted that it is not, and that, therefore, the Commission has no jurisdiction. The final point is that the sand and gravel are not minerals within the meaning of the Act of 1923, and that, therefore, on that ground also, the Commission has no jurisdiction. The mere fact that sand and gravel are being quarried and a profit is made out of them does not constitute them minerals.

[MACKINNON J. referred to s. 3, sub-s. 1, of the Act of 1923.]

For all practical purposes "minerals" and "mineral substances" are synonymous. See s. 14 of the Act of 1923; *Waring* v. *Foden.* (1) The word "substances" must be considered as ejusdem generis with "minerals." See *Jersey* (*Earl*) v. *Neath Union* (*Guardians*) (2); *Salisbury* (*Marquis of*) v. *Gladstone* (3); *Hext* v. *Gill* (4); *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (5); *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.* (6)

E. J. Rimmer for the applicants. The local authority have unreasonably withheld their consent to the lowering of the surface of the footpath in question. The objection which has been argued on behalf of the objectors does not preclude an application being made for the right to let down the surface of the footpath.

[MACKINNON J. The applicants are asking for the right to remove the surface of the footpath.]

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(1) [1932] 1 Ch. 276.

(2) (1889) 22 Q. B. D. 555.

(3) (1860) 6 H. & N. 120, 123.

(4) (1872) L. R. 7 Ch. 699.

(5) [1893] 1 Ch. 427.

(6) [1911] A. C. 290.

1936

HODDESDON U. D. C. v. BROXBOURNE SAND AND BALLAST PITS, LD. HERTFORDSHIRE COUNTY COUNCIL v. THE SAME.

The applicants propose to excavate into the face of the quarry to remove the minerals from it. They are asking for a right to excavate, and, as a result, to let down the surface. The surface will fall away, and when it has done so it will be removed. Sub-s. 2 of s. 3 of the Act of 1923 is entirely without prejudice to the generality of sub-s. 1. Under sub-s. 2 (*a*) of s. 3 the applicants claim a right, in order to work their minerals, to remove the surface, a right which the local authority itself would have the power to grant, and which they have unreasonably refused to grant after being asked by the applicants to do so. There is here a case such as is contemplated under the Act of 1923. This is, as it were, a brake on the applicants' activities in winning their minerals. It is a brake which can be removed by the consent of the local authority. The certificate of the justices in respect of the extinction or diversion of a footpath under the Highway Act, 1835, is ministerial. So also is the decision of quarter sessions subject to a right of appeal. There is no discretion on the part of the justices to refuse their certificate. Similarly, quarter sessions must enrol the certificate, unless there is an appeal by some person interested. These proceedings before the Railway and Canal Commission have been advertised in the same way as if the local authority itself had given its consent to the diversion of this footpath under a Town Planning Scheme. Under the Act of 1923, and the rules of the Commission, the same protection is afforded to the public, i.e., the protection of coming here and objecting if application is made to do that which is contrary, in their view, to the interests of the public. The contention that the procedures under the Highway Act, 1835, and the Town Planning Acts are the only means by which public footpaths can be diverted or extinguished is unsound. Under the Mines (Working Facilities and Support) Act, 1923, the Commission has power to extinguish a highway if it is of the opinion that it is a facility that it is wanted in the national interest for the acquisition and winning of minerals. The applicants are asking the Commission in this case to make what, in effect, for the time being, amounts to a diversion of the public footpath in question, but which, it is submitted, is ancillary to the right of winning the minerals. In other words, the applicants ask the Commission to allow them to let down the surface of the public footpath on such terms as the Commission think fit to impose. Sect. 13 of the Act of 1923 refers to the right of support given in connection with the works of various public bodies and local authorities—works which they carry out under Parliamentary powers.

[MACKINNON J. Is it a case that arises at all under s. 1 of the Act of 1923 ?]

Not under s. 1.

[MACKINNON J. referred to s. 3, sub-s. 1.]

The whole purpose of s. 3 is that the Commission has to determine whether or not there is some obstruction to the proper and efficient working of the minerals which is unduly hampering those who are entitled to work the minerals, owing to the inability of those persons to obtain a consent to remove the obstruction, or owing to that consent being unreasonably withheld. The functions of the Commission under the Act of 1923 entitle it to grant the applicants the facilities asked for. What the applicants ask the Commission to do is to allow them to continue working in their quarry with the result that the footpath will gradually fall down, or will be let down. Gradually the quarry will extend over the site of the original footpath and the footpath will be re-established at a lower level. To protect the interests of the public, in the meantime, the applicants are prepared to submit to such conditions, either with regard to the diversion of the footpath or with regard to the approach to the new footpath after the quarrying is over, as the Commission think fit to impose.

David Bowen in reply referred to the Local Government Act of 1894, ss. 13 and 26 ; *Holloway* v. *Egham Urban District Council* (1), per Neville J.

MACKINNON J. In this case the applicants are in possession of a certain field, and by virtue of possession of that field

(1) (1908) 72 J. P. 433, 434.

they have the right to dig sand and gravel from it, and up to a certain point they have done so. There is running across the field what is admitted to be a public right of way, a footpath. The further prosecution of their business in taking away the sand and gravel is made difficult by reason of the existence of that footpath and the right of members of the public to walk along the footpath with which the applicants must not interfere. There is in existence legal machinery by which an existing highway, a public right of way, may be diverted or put an end to. That is under ss. 84 and 85 of the Highway Act, 1835. There is the well-known procedure by which with the consent of the local authority and the certificate of two justices, an order is sought from quarter sessions that a highway may be either stopped up or diverted.

The authority concerned in this case as regards this right of way is the Hoddesdon Urban District Council, and the Hertfordshire County Council have some interest in it. As I gather, some negotiations went on between the applicants and the Hoddesdon Urban District Council with a view to its being arranged that the difficulty about this footpath should be got over. I have not read the letters, but I see that the correspondence ended with a fairly lengthy letter from the solicitors of the urban district council dated November 23, 1935, stating the terms on which the urban district council would consent to an application to vary the route of the footpath subject to the approval of quarter sessions under the Act of 1835. That was in November. The applicants apparently did not think that a satisfactory proposal, and accordingly they lodged this application in this court on December 30, 1935, applying for the grant of an ancillary right under s. 3 of the Mines (Working Facilities and Support) Act, 1923. The application under that Act is clearly not anything to do with s. 1. There is no difficulty about any power to work the minerals which would be otherwise workable, because the whole of the minerals either belong to the applicants or they have a right to work them so far as the ownership of the soil of the field is concerned.

1936

HODDESDON U. D. C. v. BROXBOURNE SAND AND BALLAST PITS, LD.

HERTFORDSHIRE COUNTY COUNCIL v. THE SAME.

MacKinnon J.

Their application is, and must be, solely under s. 3. That section provides: "(1.) Where any facility, right, or privilege is required in order that minerals may be properly and conveniently worked by the person entitled to work the same, and the proper and efficient working of the minerals is unduly hampered by the inability or failure of that person to obtain such right, facility, or privilege (hereinafter referred to as an ancillary right), such ancillary right may be conferred in the manner and subject to the provisions hereinafter appearing on the person having the right to work the minerals who is working or desirous of working them either by himself or through his lessees."

The ancillary right that is asked for is: "The extinction or diversion or the lowering of the surface of the public footpath shown upon the said plan and coloured green." That phraseology is a little inaccurate. It is not really the lowering of the surface; it is the removal of the surface and the substitution of a new surface at a lower horizontal plane. It is not a case of digging underneath the surface and so letting down the old surface, but it is a case of taking away the surface and so revealing underneath it a new level of surface.

That being the application of the applicants, the Hoddesdon Urban District Council put in their objections and the material passage in them is as follows: "The objectors further say that the right applied for (whether for extinction, diversion or lowering of the said footpath) is not a right to work or an ancillary right within the meaning of the Mines (Working Facilities and Support) Act, 1923, and that consequently this honourable court has no jurisdiction under the said Act to entertain the application." The Hertfordshire County Council, who similarly lodged objections, say: "That the procedure laid down by the Highway Act, 1835, and the Local Government Act, 1894, where it is desired to stop up or divert a highway, must exclusively be followed; and these enactments require an order of the court of quarter sessions." I think that the short point which is involved here is a point of law, and it is a point of law with which it is desirable that we should deal as a preliminary question, without hearing evidence and going into all the facts. That point of law seems to be whether, in a case where manifestly an order of quarter sessions under ss. 84 and 85 of the Highway Act, 1835, could be made for the extinction or diversion of the surface of a public footpath there is an alternative right for an applicant to come to this court and in effect get the same sort of order by the grant of an ancillary right under s. 3 of the Act of 1923. As there is that legal method of extinguishing or diverting a footpath in existence, I think that it is pretty obvious that for the applicants to succeed there must be quite clear words in another Act of Parliament which confer upon this court a concurrent jurisdiction to that of quarter sessions to make an order to the same effect. I am quite satisfied that the language of s. 3 of the Act of 1923 certainly does not clearly, and as I think does not at all, confer that concurrent jurisdiction upon this court. But in addition to the lameness of language of s. 3 to effect any such purpose, I think that it is material to observe that s. 13 of the Act, which is the savings section, says this, leaving out immaterial words: "Nothing in this part of this Act shall prejudicially affect . . . . any right of support from minerals to which any such . . . . authority . . . . may be entitled" and "Any such authority" is the repetition of the reference just above to a "local authority or other statutory body." Even if prima facie it might be thought that the language of s. 3 was sufficient to enable us under the guise of granting an ancillary right to make an order in effect equivalent to the order of quarter sessions under the Act of 1835, I think that the effect of that section would be that we ought to bear it in mind and say that if you so interpret s. 3 you are prejudicially affecting the right of support from minerals to which this local authority is entitled. On this question, therefore, I think that when an application is made, as this is, the object of which is solely the obtaining of an order from us to extinguish or divert a footpath, it is not within the jurisdiction of this court to grant it. Reference has been made to the *Sheffield Coal Company's* case (1), in which we did, as a very

(1) Unreported.

small part of a very large order, make some order which interfered with an existing right of way or a public footpath. That was, as I say, only quite a small and incidental part of a long order granting very substantial rights both under s. 1 and under s. 3 of the Act of 1923, and if I remember aright, under the enlarged powers as regards coal mines given under the second part of the Act of 1926. Unfortunately counsel have not been able to remind us of the terms of the judgment, but my recollection is that in that case, although some question had been debated at one stage of the argument whether this court had power to deal with footpaths in this way, ultimately any opposition by the local authority was withdrawn and that part of the order was made with their consent. Even in a case like that if somebody was concerned to say that we were usurping the powers of quarter sessions under the Act of 1835, the argument might have prevailed. But if it was outside our strict rights, no one was concerned to contest it, because it was only quite an incidental part in the making of a long order as regards all sorts of varied rights and facilities and it would obviously have been extremely inconvenient if, the matter having been agreed between the local authorities and the applicants, with regard to that small portion of the rights that they were to obtain, it had been necessary to go through the additional expense and delay of going through the formalities required by the Act of 1835.

SIR FRANCIS TAYLOR K.C. I agree. In my opinion it is not made out that this application is an application that, properly viewed, comes within s. 3 of the Act of 1923. It is an application to extinguish a highway, and I do not think that it can be regarded as an application to let down the surface of the footpath. If that is right, it does not seem to me to come within the terms of s. 3 as being a facility, right, or privilege which is required for the efficient working of the minerals in which the applicants are hampered. No doubt they are hampered, but they are hampered because they are unable to win and carry away the minerals which constitute the surface. Therefore, in addition to the reasons which my

1936

Hoddesdon U. D. C. *v.* Broxbourne Sand and Ballast Pits, Ld. Hertfordshire County Council *v.* The Same.

Lord has given, I think that the applicants fail on the ground that they do not bring themselves within the section.

Sir Francis Dunnell. I agree, and I have no observations which I desire to make.

Solicitors for the objectors, Hoddesdon Urban District Council: *Sharpe, Pritchard & Co. for Longmores, Hertford.*

Solicitors for the objectors, Hertfordshire County Council: *Sharpe, Pritchard & Co. for P. Elton Longmore, Hertford.*

Solicitors for the applicants: *Kenneth Brown, Baker, Baker, for Gisby & Son, Ware.*

T. W. M.

THE KING *v.* MINISTER OF HEALTH.

Ex parte VILLIERS.

1936
March 23, 24, 31.

Local Government—Open Space—Special Act—Power to exchange lands for other adjoining lands—Housing—General Act—Power to appropriate any lands vested in local authority in exchange for other lands whether adjoining or not, subject to certificate of Minister—Proposal to appropriate part of open space in exchange for land at a distance—Generalia specialibus non derogant—Extent of principle—Prohibition—London Open Spaces Act, 1893 (56 *&* 57 *Vict. c. lxxi.*), *ss.* 5 *and* 12*—Housing Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 14), *ss.* 65, 103, 120, *sub-s.* 1; 134.

By the London Open Spaces Act, 1893, Hackney Marshes was vested in the London County Council in fee simple as and for an open space for the perpetual use thereof by the public for exercise and recreation. Sect. 12 of that Act provided that the Council might from time to time exchange any lands forming part of Hackney Marshes for any other lands "adjoining."

In 1935, the London County Council, in purported exercise of their powers under s. 65 of the Housing Act, 1925, of appropriating for housing lands vested in them, resolved that, subject to the certificate of the Minister under s. 103, sub-s. 1, of that Act, thirty acres of Hackney Marshes should be appropriated for housing and that fifty acres of land at Chigwell, about seven miles away, should be given in exchange.

The applicant having addressed a protest to the Minister against the proposed appropriation and exchange was informed

1936

REX
v.
MINISTER
OF
HEALTH.
VILLIERS,
Ex parte.

that the Minister proposed to hold a public inquiry under s. 103, sub-s. 2, of the Housing Act, 1925.

The applicant then obtained a rule nisi for a writ of prohibition to prohibit the Minister from (*a*) consenting to the appropriation by the London County Council of a portion of Hackney Marshes, (*b*) issuing his certificate under s. 103, sub-s. 1, of the Housing Act, 1925, approving the giving in exchange of an area of land at Chigwell, and (*c*) holding a public local inquiry in relation to those matters under s. 103, sub-s. 2, of the Housing Act, 1925:—

Held, by the Divisional Court (Lord Hewart C.J., du Parcq and Goddard JJ.), (1.) that prohibition would lie.

Rex v. *Electricity Commissioners. Ex parte London Joint Committee* [1924] 1 K. B. 171 applied.

(2.) that in exercising its powers of appropriation of land under s. 65, a local authority need not act by an "order," and therefore the resolution of the London County Council was not bad merely because it was not under seal.

(3.) that the Housing Act, 1925, which is a consolidating Act repealing and re-enacting the Housing of the Working Classes Act, 1890, and the Housing, Town Planning, &c., Act, 1909 (from which ss. 65 and 103 are respectively taken), did not affect an Act passed between the original enactment of s. 57, sub-s. 3, of the Act of 1890 and its re-enactment in s. 65 of the consolidating Act. It was manifest that the Council could not, immediately after the Act of 1893 had vested Hackney Marshes in them as an open space, have appropriated part of the Marshes for housing under the Act of 1890. They had no greater powers under the Act of 1925.

Morisse v. *Royal British Bank* (1856) 1 C. B. (N. S.) 67 at p. 86 applied.

(4.) That the maxim "generalia specialibus non derogant" also applied to prevent the Housing Act, 1925, overriding the special provisions of the London Open Spaces Act, 1893, with regard to Hackney Marshes.

Statement of the principle by Stirling J. in *In re Smith's Estate. Clements* v. *Ward* (1887) 35 Ch. D. 589 at p. 595 approved and followed.

RULE NISI for a writ of prohibition.

A rule was granted by a Divisional Court on December 4, 1935, at the instance of the Hon. Arthur George Child Villiers, calling on the Minister of Health to show cause why a writ of prohibition should not be awarded to prohibit him from (*a*) consenting to the appropriation by the London County Council of a portion of Hackney Marshes; (*b*) issuing his certificate under s. 103, sub-s. 1, of the Housing Act, 1925, approving the giving in exchange for such portion of Hackney

Marshes an area of land at Chigwell, Essex; and (*c*) holding a public local inquiry under s. 103, sub-s. 2, of the Housing Act, 1925.

The applicant had for more than twenty years resided at the Manor House, Riseholme Street, Hackney Wick, and paid the rates in respect thereof. He was one of the joint legal and beneficial owners of the Manor House, and a Parliamentary and Municipal voter in the Hackney district. The Manor House and the annexe thereto were partly used as a sports and social club for the members of the Eton Manor Club, of which Mr. Villiers was (and had been for more than twenty years) one of the managers. The members of the club were drawn from persons residing in the neighbourhood of Hackney Marshes, an open space vested in the London County Council by the London Open Spaces Act, 1893. (1) Exercise and recreation for the public were provided on Hackney Marshes in accordance with the Act. On one portion of the Marshes, known as a "permit area," pitches for cricket and football could be reserved, and a charge was made by the Council for preparing and marking out such pitches. That part of the Marshes was not available to persons other than those who had reserved pitches. Another part of the Marshes, known as a "non-permit" area, was 30 acres in extent. For that area no charge was made and no permit was necessary. That area was largely used by the poorer and younger members of the community, including boys of the Eton Manor Club.

(1) The London Open Spaces Act, 1893 (56 & 57 Vict. c. lxxi.), s. 5: "From and after the passing of this Act Hackney Marshes are hereby vested absolutely in the Council in fee simple and the Council shall from and after the passing of this Act hold the same (excepting any highways thereover) discharged from all estates interests rights titles charges and incumbrances whatsoever in to over or affecting the same or any part thereof as and for an open space for the perpetual use thereof by the public for exercise and recreation and shall maintain preserve manage and regulate the same as such accordingly."

Sect. 12: "The Council may from time to time by agreement with any person exchange any lands forming part of Hackney Marshes for any other lands adjoining which the Council may think it desirable to substitute for such first-mentioned lands."

1936

REX
v.
MINISTER
OF
HEALTH.
VILLIERS,
Ex parte.

The Housing Act, 1925 (1), imposed on local authorities by s. 60 a duty to submit to the Minister of Health schemes for the provision of houses for the working classes, and contained various powers for the acquisition and appropriation of land for that purpose.

A joint report was made to the London County Council by its Housing and Public Health Committee and its Parks Committee to the effect that, in spite of the great objections to taking any part of an open space, the only practicable method of fulfilling its duties under the Housing Act, 1925, would be for the Council to appropriate, under s. 103 of the Act, thirty acres of Hackney Marshes, giving in exchange therefor fifty acres of land at Chigwell in the county of Essex. The thirty acres proposed to be taken was the "non-permit area" above referred to. It was as far removed as possible from the dressing and refreshment rooms used by players on the reserved pitches, and adjoined a residential area.

On consideration of that report the London County Council

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(1) The Housing Act, 1925 (15 & 16 Geo. 5, c. 14), s. 64: "A local authority may be authorised to purchase land compulsorily for the purposes of this Part of this Act, by means of an order submitted to the Minister and confirmed by him in accordance with the Third Schedule to this Act."

Sect. 65: "A local authority may, with the consent of the Minister, appropriate, for the purposes of this Part of this Act, any houses or land which may be for the time being vested in them, or at their disposal, subject as respects land vested in them for educational purposes to the provisions of section 114 of the Education Act, 1921."

Sect. 103 (as amended by s. 63, sub-s. 2, and the Fifth Schedule of the Housing Act, 1930, and the Sixth Schedule (Part II.) of the Housing Act, 1935):—

"(1.) Where any order under this Act authorises the acquisition or appropriation to any other purpose of any land forming part of any common, open space, or allotment, the order, so far as it relates to the acquisition or appropriation of such land, shall be provisional only, and shall not have effect unless and until it is confirmed by Parliament, except where the order provides for giving in exchange for such land other land, not being less in area, certified by the Minister after consultation with the Minister of Agriculture and Fisheries to be equally advantageous to the persons, if any, entitled to commonable or other rights and to the public.

(2.) Before giving any such certificate, the Minister shall give public notice of the proposed exchange, on July 31, 1935, in purported pursuance of their powers under the Housing Act, 1925, passed the following resolution: "That, subject to the certificate of the Minister of Health under section 103 of the Housing Act, 1925, the land about 30 acres in extent, forming part of the public open space known as Hackney Marshes, and shown approximately by pink colour on the map (Registered No. 15050), be appropriated for housing purposes; and that, in exchange for such land, the land, about 50 acres in extent, forming part of the Chigwell housing site and shown approximately by pink colour on the map (Registered No. 15051), be appropriated for the purposes of the Open Spaces Act, 1906."

Public notices of the resolution were inserted in the issues of two newspapers dated October 18, 1935, and on Mr. Villiers' instructions his solicitors, Messrs. Slaughter & May, wrote

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and shall afford opportunities to all persons interested to make representations and objections in relation thereto, and shall, if necessary, hold a local inquiry on the subject.

(3.) Where any such order authorises such an exchange, the order shall provide for vesting the land given in exchange in the persons in whom the common, open space or allotment was vested, subject to the same rights, trusts, and incidents as attached to the common, open space or allotment, and for discharging the part of the common, open space or allotment acquired or appropriated from all rights, trusts, and incidents to which it was previously subject.

(4.) For the purposes of this Act the expression 'common' includes any land subject to be enclosed under the Inclosure Acts, 1845 to 1882, and any town or village green; the expression 'open space' means any land laid out as a public garden or used for the purposes of public recreation, and any disused burial ground; and the expression 'allotment' means any allotment set out as a fuel allotment or a field garden allotment under an Inclosure Act."

Sect. 120, sub-s. 1: "An order in writing made by a local authority under this Act shall be under their seal and authenticated by the signature of their clerk or his lawful deputy."

Sect. 134: "All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not been passed, ... Provided that a local authority shall not, by reason of any local Act relating to a place within its jurisdiction, be exempted from the performance of any duty or obligation to which such authority are subject under any Part of this Act."

to the Minister of Health on October 30, 1935, as follows :—

" Sir,

HACKNEY MARSHES.

We are instructed on behalf of the undermentioned bodies to protest against the proposed appropriation by the London County Council for housing purposes of part of the open space now known as Hackney Marshes. The bodies and persons on whose behalf we are instructed (amongst others) are as follows :—The Trustees of Manor Charitable Trust, Eton Manor Club, the Hon. A. G. C. Villiers, D.S.O.

Our protest is based on the grounds (inter alia) that the London County Council have no power under the Housing Act, 1925, to appropriate for housing purposes an open space created by a special statutory enactment and further that, even if the power of appropriation is vested in them under the Housing Act, 1925, the proposals now put forward do not comply with the requirements of section 103 of that Act."

They were informed that the Minister proposed to hold a public inquiry under s. 103, sub-s. 2, of the Housing Act, 1925, and that December 18, 1935, had been suggested as the date.

Mr. Villiers then moved for the present rule, alleging in his affidavit that if the Minister gave his consent to the proposed appropriation, or to the proposed exchange, the public, including the boys and girls residing in the neighbourhood of the Hackney site, would be permanently deprived of the enjoyment of the site for exercise and recreation. The proposed Chigwell site was about seven miles away, and the return fare by rail or omnibus was about a shilling. By reason of its distance from Hackney the Chigwell site was for all practical purposes valueless to those who resorted to the Hackney site. He submitted that by reason of his local situation as a resident and ratepayer in the immediate locality and as a manager of the Eton Manor Club he had a peculiar grievance.

The grounds on which the rule nisi was granted were (I.) that by virtue of the London Open Spaces Act, 1893 (56 & 57 Vict. c. lxxi.), Hackney Marshes must be held and maintained by the London County Council (subject to the express provisions of that Act) as and for an open space for the perpetual use thereof by the public for recreation; (2.) that the London County Council had no power to appropriate any part of Hackney Marshes for housing purposes under Part III. of the Housing Act, 1925, and therefore the Minister of Health had no power to consent to such appropriation; (3.) that the site at Chigwell did not adjoin Hackney Marshes; (4.) that the proposed public local inquiry involved consideration of proposals which the Minister of Health had no jurisdiction to entertain; (5.) that the resolution of the London County Council dated July 31, 1935, was not an "order" within the meaning of the Housing Act, 1925, nor did it comply with the provisions of the Housing Act, 1925, and in consequence the Minister of Health had no jurisdiction to grant a certificate under s. 103, sub-s. 1, of that Act; and (6.) that the proposal to appropriate the site at Chigwell for the purposes of the Open Spaces Act, 1906, was ultra vires the London County Council, or was not in conformity with s. 103 of the Housing Act, 1925.

Sir Donald Somervell A.-G. and *Valentine Holmes* showing cause for the Minister of Health. We leave the main question as to the power of the London County Council to take part of Hackney Marshes to be argued on behalf of the Council as the party primarily interested. Moreover, since the Minister, if the rule is discharged, will have to hold a public inquiry and hear the views of the other parties it is undesirable that he should put forward any argument on either side.

But the minor point is taken that the resolution of the London County Council is not an "order" within the Housing Act, 1925, because it does not comply with s. 120, sub-s. 1. But the machinery provided for acquisition of land under s. 64 and for appropriation of land under s. 65 is different. In the former case the local authority acts "by order submitted to the Minister and confirmed by him." Under s. 65 there is no order by the local authority, which merely applies for the consent of the Minister, who, it is submitted, gives it by an order made by him.

While all parties are desirous that the case should be determined on its merits and that the judgment of the Court should not be based on technical grounds, the Minister also desires formally to mention the contention that this is not a case in which prohibition will lie. It goes beyond *Rex* v. *Electricity Commissioners* (1) and *Errington* v. *Minister of Health* (2), and the Minister does not want it to go into the books as a decision that prohibition will lie in such circumstances as those in the present case.

Sir William Jowitt K.C. and *H. G. Robertson* for the London County Council. While recognizing the wider considerations to which the Minister must have regard, we do not join in the Attorney-General's submission that prohibition does not lie. It would be disastrous both to the Council and the applicant if the Court's decision were rested on that ground so that the merits remain undecided. It is not clear what remedy, other than prohibition, there could be.

It would be equally unfortunate if the decision were based on the alleged informality of the order. An "order" must be an order on some one else to do something. A local authority cannot make an order on itself, and the term is inapplicable to a declaration of intention to appropriate to a particular purpose land already vested in the local authority. The appropriate method in such a case is to pass a resolution—which at that stage affects no one, and does not even allow the local authority to deal with its own land—and submit it to the Minister for approval. The order under s. 103 of the Act of 1925 is made by the Minister.

As to the main question, the attack on the validity of the Council's proposal to take the land is based on the maxim "generalia specialibus non derogant." It is said that this open space is provided for by a particular Act—whether a private or a public general Act appears to be immaterial—and that the general Act, the Housing Act, 1925, does not enable the Council to take part of that open space in exchange for lands which admittedly are not "adjoining" lands. But Hackney Marshes is in no different position in that respect

(1) [1924] 1 K. B. 171.

(2) [1935] 1 K. B. 249.

from the vast majority of London's open spaces. Nearly all are given to the public in perpetuity, many of them by schemes confirmed by Act of Parliament under the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122).

The maxim "generalia specialibus non derogant" is only a matter of presumption. It is necessary to consider the wording of the general Act to see whether the fair inference is that Parliament had the special Act in mind at the later date. The maxim is subject to limitation. It is submitted that it has no application to rights conferred on whole classes or sections of the community, but where, often as the result of a bargain, particular benefits have been conferred on individuals, it would be manifestly unfair to hold that those benefits are taken away by a subsequent general Act, without the parties being heard, unless the language of the later Act necessarily involves that result. [For the scope of the maxim they referred to *Garnett* v. *Bradley* (1); *Blackpool Corporation* v. *Starr Estate Co.* (2); *The Vera Cruz* (*No.* 2) (3); and to Maxwell on Interpretation of Statutes, 7th ed., p. 157, and for other statutory provisions relating to open spaces they cited the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), and some of the schemes made and confirmed thereunder, the Open Spaces Acts, 1877 to 1890, the Open Spaces Act, 1906 (6 Edw. 7, c. 25), and the London County Council (General Powers) Act, 1915 (5 & 6 Geo. 5, c. ciii.), s. 60.]

Sir Patrick Hastings K.C., *Trustram Eve K.C.*, and *J. P. Ashworth* in support of the rule. On the question whether prohibition lies, where there is a patent lack of jurisdiction any person may apply for prohibition, and the Court will grant it as of right. *Rex* v. *Minister of Health: Ex parte Davis* (4) was a stronger case than the present. [They relied also on *Rex* v. *Electricity Commissioners.* (5)]

The order, or purported order, of the London County Council was invalid. There is no question that under s. 64 of the Housing Act, 1925, the order for compulsory acquisition is the order of the local authority. Sect. 65, it is true, does not in terms refer to the making of an "order," but it is perfectly clear from s. 103, sub-s. 1, that before the Minister can be asked to give a certificate there must be an order of the local authority. By s. 120, sub-s. 1, the order must be under seal. A resolution is insufficient.

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(1) (1878) 3 App. Cas. 944, 968.

(2) [1922] 1 A. C. 27, 34.

(3) (1884) 10 App. Cas. 59, 68.

(4) [1929] 1 K. B. 619.

(5) [1924] 1 K. B. 171.

The general principle expressed in the maxim "generalia specialibus non derogant" is not in dispute. The question at issue is whether that principle is subject to the limitation suggested on behalf of the London County Council—namely, that it applies only to cases where the special Act has conferred rights or benefits on particular individuals or classes of individuals. We submit that there is no such limitation, but that the principle applies whenever the special Act deals with a particular subject-matter, whether the rights conferred in relation to that particular subject-matter are particular or general. If that view be right, two questions remain for decision in the present case: (1.) whether the London Open Spaces Act, 1893, is a "special Act" within the meaning of the principle; and (2.) if so, whether the true construction of the Housing Act, 1925, necessitates any derogation from the terms of that special Act.

The Vera Cruz (No. 2) (1) and *Garnett* v. *Bradley* (2) do not support the contention that the principle generalia specialibus non derogant is confined to Acts conferring private rights on individuals. Such a contention, indeed, does not seem to have been put forward in any case within the last hundred years. Those cases show that a "special Act" is one dealing with a particular subject-matter or class of subject-matter. There is a very large number of authorities to the like effect, many of which are conveniently collected in Maxwell on Interpretation of Statutes, 7th ed., pp. 152–160. Beyond saying that wherever looked at these authorities seem to negative the proposition that there must be something in the nature of a private interest, we propose to exercise a spirit of moderation and refrain from troubling the Court with more than three of them. [They cited *Fitzgerald* v.

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(1) 10 App. Cas. 59.

(2) 3 App. Cas. 944.

Champneys (1); *In re Smith's Estate* (2); *London and Blackwall Ry. Co.* v. *Limehouse and District Board of Works.* (3)]

The various Acts relating to open spaces in London cited for the London County Council are inapplicable to the present case. Hackney Marshes could not have been dealt with under any of those Acts, for as appeared from two agreements scheduled to the London Open Spaces Act, 1893, the lands comprised in Hackney Marshes were "Lammas lands." "Lammas lands" were lands held on a very peculiar tenure. Down to Lammas Day in each year the owner could exercise all the rights of an owner in fee simple, and could plough, sow and reap his crops. But from Lammas Day to the end of the year they became common grazing lands, over which persons might have rights of pasturage who had no Lammas rights at all. Such lands could only be dealt with by a special Act, and not by a scheme under the Metropolitan Commons Act, 1866, which was the only one of the general Open Spaces Acts cited by Sir William Jowitt to continue in force after the Consolidating Act of 1906. In the provinces, open spaces are dealt with under the provisions in the Public Health Act, 1875, but those provisions do not apply to London.

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), is of vital importance, for many of the powers in the Act of 1925 were taken ipsissimis verbis from the Act of 1890. By ss. 56 to 60 of that Act very wide powers of appropriation were vested in local authorities. Sect. 65 of the Act of 1925 is s. 57, sub-s. 3, of the Act of 1890. Sect. 103 of 1925 is a verbatim re-enactment of s. 73 of the Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), while s. 134 of 1925, on which Sir William Jowitt relied as giving enlarged powers to the County Council, is s. 91 of 1890. Whatever, therefore, the Council could do under s. 65 or s. 134 in 1925 they could have done in 1893, and the very day after the London Open Spaces Act, 1893, was passed to preserve Hackney Marshes as an open space, the London County Council could have appropriated it for housing, subject only to the statutory consents.

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(1) (1861) 2 J. & H. 31, 30 L. J. (Ch.) 777.

(2) 35 Ch. D. 589.

(3) (1856) 3 K. & J. 123.

[LORD HEWART C.J. You say that if the London County Council could act under the Act of 1925, they could equally have acted in the same way before 1925, under the Act of 1890, but that they could not have acted under the Act of 1890, because it was earlier than the special Act of 1893?]

Yes, we put it both ways. The special Act of 1893 overrides the general Act of 1890, and on the same principle the general Act of 1925 cannot override the special Act. The re-enaction in a consolidating Act of an earlier section does not affect an Act passed in the interval between the original Act and the re-enactment: see *Stewart* v. *Thames Conservators* (1); *Morisse* v. *Royal British Bank* (2); *Gilbert* v. *Gilbert and Boucher.* (3)

The provision as to exchange of lands now found in s. 103 was first found in the Housing, Town Planning, &c., Act, 1909, but could not override the express provision in the special Act as to exchange of "adjoining" lands.

It is not contended that the Act of 1925 would not apply to the vast majority of open spaces which are governed by the Public Health Act, 1875, in the provinces, and the Open Spaces Act, 1906, in London. But there are two exceptions: (1.) the few open spaces provided by schemes confirmed by Parliament under the Metropolitan Commons Act, 1866, and (2.) Hackney Marshes with its special Act of 1893.

Cur. adv. vult.

1936. March 31. The judgment of the Court (LORD HEWART C.J., DU PARCQ and GODDARD JJ.) was read by

LORD HEWART C.J. In this case Sir Patrick Hastings obtained a rule nisi calling upon the Minister of Health to show cause why a writ of prohibition should not issue prohibiting him from (*a*) consenting to the appropriation by the London County Council of a portion of Hackney Marshes;

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(1) [1908] 1 K. B. 893.
(2) 1 C. B. (N. S.) 67, 86.
(3) [1928] P. 1.

(*b*) issuing his certificate under s. 103, sub-s. 1, of the Housing Act, 1925, approving the giving in exchange for such portion of Hackney Marshes an area of land at Chigwell; and (*c*) holding a public local inquiry in relation to these matters under s. 103, sub-s. 2, of the Housing Act, 1925. Cause was shown against the rule by the Attorney-General on behalf of the Minister and by Sir William Jowitt on behalf of the London County Council, to whom notice of the rule was directed to be given.

The facts are that by a local Act entitled the London Open Spaces Act, 1893, Hackney Marshes were vested absolutely in the London County Council in fee simple, freed from all rights titles and interests whatsoever as and for an open space for the perpetual use thereof by the public for exercise and recreation, and were to be maintained and preserved by the Council as such accordingly. The Act contained a provision (s. 12) that the Council might from time to time by agreement exchange any lands forming part of the Marshes for any other lands adjoining, which the Council might think it desirable to substitute for any of the first-mentioned lands. It appears from the preamble to the Act and the agreements scheduled thereto that the lands were what are known as Lammas lands forming part of the manor of Lords Hold, Hackney, and were bought by the Council from Lord Amherst and his Trustee, who were the owners in fee. But, although the Council bought, it is important to observe that the money was provided partly by subscriptions, the commoners receiving also a sum of money for the surrender of their rights. The Marshes have since been used as playing fields, and no charge is made for the use of the 30 acres which form the subject-matter of the present proceedings. This area is used by the poorer members of the public, including boys from the Eton Manor Club, for games and recreation, and the rule was obtained at the instance of Mr. Villiers, one of the managers of that club, who desires to preserve the open space. In July, 1935, the Council determined to apply to the Minister of Health for his consent to their appropriating the 30 acres referred

1936

REX
v.
MINISTER
OF
HEALTH.
VILLIERS,
Ex parte.

to for a housing scheme, offering in exchange some land at Chigwell, which however is some seven miles distant from Hackney. In making this application the Council acted with great reluctance, and selected the Marshes for their housing site only because of the impossibility of finding another alternative site in the neighbourhood on which to build. The principal question for determination is whether the Housing Act, 1925, permits this course to be taken, in spite of the obligation imposed on the Council by the Act of 1893 to maintain the Marshes as an open space.

In showing cause for the Minister, the Attorney-General left this question for argument by counsel for the London County Council, and dealt only with two subsidiary matters. His first submission was that this case went beyond previous cases, where it has been held that prohibition would lie to a Minister or Government Department. The Court, however, is of opinion that this case comes exactly within the judgment of the Court of Appeal in *Rex* v. *Electricity Commissioners* (1), and is indistinguishable in principle from that case. The Minister is proposing to hold an inquiry and to determine questions relating to the rights of subjects. If then, as Atkin L.J. (as he then was) pointed out, these proceedings establish that the Minister is exceeding his jurisdiction by entertaining matters which would result in his final decision being liable to be quashed on certiorari, as it would be if the Housing Act, 1925, has no application to this case, prohibition will lie.

The other matter dealt with by the Attorney-General may be very shortly disposed of. One of the grounds on which the rule was moved was that the resolution of the London County Council was not an "order" within the meaning of the Act of 1925, in that it was not under seal and that consequently there was no jurisdiction to grant a certificate under s. 103, sub-s. 1. But, as the Attorney-General contended, there is no need for the London County Council to make any order when they are proceeding under s. 65 of the Act, which is the section dealing with the appropriation of their own lands by a local authority for housing purposes. We agree with him that this is not a point which will avail the applicant for the writ.

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(1) [1924] 1 K. B. 171.

We now come to the principal question in the case, which is whether the general statute, the Housing Act, 1925, affects or alters the local statute, the London Open Spaces Act, 1893, so as to enable the County Council to appropriate part of Hackney Marshes for building, giving in exchange land at Chigwell.

Now the Act of 1925 is, as its title shows, a consolidating Act. It repeals, with one immaterial exception, the whole of the Housing of the Working Classes Act, 1890, and also Parts I. and IV. of the Housing, Town Planning, &c., Act, 1909, so far as it relates to housing and not to town planning. It also repeals in whole or in part various other Acts relating to housing which are immaterial to this case. The provisions of the repealed Acts are re-enacted practically verbatim. Sect. 65 of the Act of 1925, under which the Council claim to be entitled to appropriate the lands, corresponds exactly, save for certain necessary verbal alterations due to subsequent legislation, with s. 57, sub-s. 3, of the Act of 1890. Sect. 103 of the Act of 1925 is taken bodily from s. 73 of the Housing, Town Planning, &c., Act, 1909. Now it cannot be seriously contended, nor indeed did Sir William Jowitt attempt to argue, that when Parliament passed the local Act of 1893, constituting Hackney Marshes a public open space in perpetuity and directing the Council so to maintain it, it was intended that the Council should at the same time have power immediately to appropriate it to housing purposes. It seems obvious that it was intended to put Hackney Marshes in an exceptional position by contrast with other lands vested in the Council, which they could, if they desired, appropriate for housing. Sect. 73 of the Act of 1909 is complementary to s. 57 of the Act of 1890; it provides for the procedure to be followed when under the Act of 1890 the Council desire to acquire or appropriate for any other purpose land forming a part of a common or open space. If, therefore, s. 57, sub-s. 3, of the Act of 1890 did not apply to Hackney Marshes because

1936

REX
v.
MINISTER
OF
HEALTH.
VILLIERS,
Ex parte.

of the Act of 1893, neither did s. 73 of the Act of 1909. In our opinion, when these Acts were repealed and re-enacted by a consolidating Act, the position remained exactly as it was before the consolidating Act was passed. A statute which repeals and re-enacts the provisions of an earlier Act cannot have the effect of repealing an intermediate enactment: see *Morisse* v. *Royal British Bank.* (1)

While this conclusion would be enough to dispose of the contention put forward by the London County Council, we think we ought also to refer shortly to another contention which was fully argued on both sides. Sir Patrick Hastings contends that the Act of 1893 is a special Act, that is, an Act dealing with a specific subject-matter in a particular way, and accordingly is not to be deemed to be affected by a subsequent general Act, unless such an intention is specifically declared, in accordance with the well known maxim "generalia specialibus non derogant." Sir William Jowitt's answer is that the Act was not a special Act, in that it does not protect the rights of individuals or a class of individuals, but only the rights of the public, and he relies particularly on the speech of Lord Blackburn in *Garnett* v. *Bradley.* (2) His argument is that under the Act of 1893 the Council were given power to exchange the lands for others adjoining, and therefore all that the Act of 1925 does is to widen that power and allow an exchange for any lands, provided that the original land is to be used for housing and the exchange has the consent of the Minister. The maxim to which we have referred has been the subject of an almost bewildering mass of authority, and no doubt the reasons given in support of it have differed somewhat in expression from time to time, probably because more reasons than one can be given. In our judgment the true grounds are stated as clearly as anywhere by Stirling J. in *In re Smith's Estate* (3), where he says: "Where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation." If express words are absent, there must at least be necessary implication. To the same effect is the speech of Lord Haldane in *Blackpool Corporation* v. *Starr Estate Co.* (1)

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(1) 1 C. B. (N. S.) 67, 86.
(2) 3 App. Cas. 944, 968.
(3) 35 Ch. D. 589, 595.

Now here we have a special subject-matter and one, moreover, of a peculiar kind, Lammas lands. To these lands the various Open Spaces Acts do not apply, and it is at least doubtful whether the Metropolitan Commons Act, 1866, applies to them. If it does apply, the procedure under that Act entails the passing of a special confirming Act. The subject-matter is also dealt with not only in a special but in a quite peculiar way. Under s. 12 a right to exchange for "adjoining" lands is given, and the lands taken in exchange are to be deemed part of Hackney Marshes, and are so to be held by the Council. We can find nothing in the Act of 1925 that indicates any intention on the part of Parliament to effect so radical a change in the Act of 1893 as to permit the Council to build on a part of Hackney Marshes in exchange for lands seven miles away at Chigwell, and to deprive Hackney of an open space while providing one for a part of the population entirely different from that which now enjoys the advantages of the Marshes.

While we recognize to the full the difficulty that confronts the London County Council in finding space on which to re-house that part of the population of East London whose present dwellings are unsatisfactory, and it may be deplorable, we are bound to hold that existing statutes do not permit them to make use of Hackney Marshes for this purpose. Accordingly, the rule will be made absolute and a Writ of Prohibition must issue.

The judgment which I have just read is the unanimous judgment of this Court.

Rule absolute.

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(1) [1922] 1 A. C. 27, 34.

Solicitor for the Minister: *Solicitor, Ministry of Health.*

Solicitor for the London County Council: *J. R. Howard Roberts.*

Solicitors for the applicant: *Slaughter & May.*

J. W. H.

1936
April 3, 8.

OTTO *v.* BOLTON AND NORRIS.

Negligence—Sale of house—Builder's duty as vendor—Defective ceiling—Warranty to purchaser—No duty to occupant—Proximate relationship—Concealed defect—Opportunity to inspect.

A builder who builds a house for sale is under no duty either to a future purchaser or to persons who come to live in the house to take care that it is well constructed and safe.

Bottomley v. *Bannister* [1932] 1 K. B. 458 followed.

The law as stated by Scrutton L.J. and Greer L.J. in *Bottomley* v. *Bannister* (above) at pp. 468, 477, has not been altered by the decision of the House of Lords in *Donoghue* v. *Stevenson* [1932] A. C. 562.

The principle laid down in *Donoghue's* case is that there can be no duty cast upon the vendor without proximate relationship, of which the main test is whether there is reasonable opportunity for examination between the time of the sale or the doing of the work and the use or consumption of the article by the purchaser.

ACTION tried by Atkinson J. without a jury.

The defendants were the owners of a building estate at Tillingbourne Gardens, Finchley, in the county of Middlesex, which they were developing by the erection and sale of dwelling-houses. On or about September 5, 1933, an interview took place between the first plaintiff, Miss Otto, and Mr. Norris, a member of the defendant firm, when it was agreed that if Miss Otto bought the house, No. 8 Tillingbourne Gardens, which was in course of erection, the defendants would construct an additional bedroom and complete the house for occupation. Mr. Norris assured Miss Otto that the house was well built, and in reliance on that assurance Miss Otto agreed by contract in writing dated September 8, 1933, to buy the house from the defendants, and the defendants agreed to complete the house and decorations to her reasonable approval after completion of the purchase. According to the statement of claim it was an express term and warranty of the agreement that the house should be well built and free from defects. The plaintiffs also alleged that it was an implied term and warranty of the agreement that the house should be built and completed in an efficient manner and of proper materials and should be fit for habitation. The purchase was completed and the plaintiffs entered into occupation in November, 1933. They alleged that the house was not well built or free from defect and was not fit for habitation. In particular, that the ceilings of the first floor were so badly constructed, or had been damaged and so badly repaired that they were defective and unsafe. Falls of the ceilings took place in the bedrooms in May, 1934, and again in March and April, 1935. The particulars given in the statement of claim were that the coarse stuff had insufficient hair in it and had been badly mixed ; that it had been repaired, but that the repairs were ineffective.

The plaintiffs alleged that the defendants knew that the house was required for immediate occupation and that it was their duty to take care in the construction of the house to prevent its being dangerous ; and that in breach thereof the defendants negligently caused the ceilings to remain defective and unsafe. Miss Otto, the purchaser of the house, claimed 361*l*., the cost of reconstructing the ceilings and repairing the damage to furniture and of renting other premises while the work was being done. The second plaintiff, Mrs. Otto, claimed 65*l*. damages for personal injuries caused by the fall of the ceiling in May, 1934, due to the defendants' negligence. Part of the plaster fell upon her, and she alleged that the defendants owed a duty to her in the construction of the house to prevent it being a danger to her.

By their defence the defendants pleaded that the house was completed and passed for habitation by the surveyor to the Finchley Urban District Council on July 8, 1933. They denied that there was any term or warranty in respect of the house. In the alternative they alleged that any such warranty extended only to the work required to complete the house, being the final decorations. They also alleged that Miss Otto caused the house to be surveyed on her own behalf before entering for occupation. As to the damages claimed by Mrs. Otto, they pleaded that these were not recoverable in law.

F. J. Tucker K.C. and *W. E. P. Done* for the plaintiffs. There was both an express and an implied warranty here that the house was well built and fit for occupation.

During the negotiations directly leading up to the purchase Mr. Norris assured Miss Otto that the house was well built. That was a collateral undertaking, and being so given it constituted a warranty. No precise form of words is necessary for this, and once given it becomes part of the contract: *Heilbut, Symons & Co.* v. *Buckleton* (1), where the test is laid down by Lord Moulton, who discusses *De Lassalle* v. *Guildford.* (2) [They cited also *Miller* v. *Cannon Hill Estates.* (3)]

As regards the claim of Mrs. Otto, which is based on the negligence of the defendants in supplying bad material and failing to inspect the work, we rely on *Donoghue* v. *Stevenson* (4), which laid down that a manufacturer of certain articles, sold in circumstances which prevent the purchaser from discovering the defect by inspection, is under a legal duty to take care that the article is free from defect likely to injure health. The same principle extends to the sale of a house by the builders for occupation. This doctrine does not apply only to a thing dangerous in itself, as has been suggested in some cases. That which is dangerous owing to negligent construction, and not as being dangerous in itself, is the more dangerous of the two, and an even greater degree of care is required: judgment of Lord Atkin in *Donoghue* v. *Stevenson.* (5) It was not intended by the House of Lords to confine the occupant's rights to a case where the damage is due to a chattel and to refuse a remedy where it is due to something which is part of the realty. The liability in tort is independent of any question of contract. The duty exists where, as here, the defect is

(1) [1913] A. C. 30, 49.
(2) [1901] 2 K. B. 215.
(3) [1931] 2 K. B. 113.
(4) [1932] A. C. 562.
(5) Ibid. 595.

hidden and unknown to the purchaser or occupier: *Grant* v. *Australian Knitting Mills.* (1)

W. Clothier K.C. and *G. O. Slade* for the defendants. The damage here was done after the house was built and might have been due to electricians and other outside workmen. In any case the representations of the vendors before sale were only trade puff and did not amount to a warranty. In *Miller* v. *Cannon Hill Estates* (2) Swift J. did not find that there was an express warranty, and so far as there was an implied warranty, both that case and *Lawrence* v. *Cassell* (3) are distinguishable, because the houses sold in both those cases were in the early stages of building. There was ample opportunity here for inspection before purchase and no warranty existed in the absence of express terms, which have not been proved. As to the liability in tort we rely upon *Bottomley* v. *Bannister* (4), in which Scrutton L.J. states the law as follows:—"It is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence." So too Greer L.J. in the same case (5) (after referring to *Cavalier* v. *Pope* (6)) said: "A purchaser of the freehold is, in my judgment, in no better position than a tenant." Since that decision *Donoghue* v. *Stevenson* (7) has been decided by the House of Lords, but that has not affected *Bottomley* v. *Bannister* (4), which is referred to by Lord Atkin in his judgment without criticism. It has no application to houses or realty, but only to chattels, in which the relations of the parties is "proximate," as Lord Atkin says, and there is no opportunity of inspection by the purchaser. In the case of the sale of a house—completed here before sale, except for an agreed addition—Miss Otto had ample time and opportunity

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(1) [1936] A. C. 85.
(2) [1931] 2 K. B. 113.
(3) [1930] 2 K. B. 83.
(4) [1932] 1 K. B. 458, 468.
(5) Ibid. 477.
(6) [1906] A. C. 428.
(7) [1932] A. C. 562.

BIBL. LONDIN. UNIV.

1936

OTTO
v.
BOLTON
AND
NORRIS.

to inspect, and neither in contract nor in tort have the plaintiffs any cause of action.

Tucker K.C. in reply. The observations of Scrutton L.J. in *Bottomley* v. *Bannister* (1) only apply to contract and not to a claim in tort such as that of Mrs. Otto. That case cannot be regarded as a binding authority here having regard to *Donoghue* v. *Stevenson* (2), which was subsequent. The claim of Mrs. Otto on the ground of negligence comes within the doctrine in *Heaven* v. *Pender* (3), and the defendants are liable.

Cur. adv. vult.

April 8. ATKINSON J. [after stating the facts and discussing the evidence, said :] I accept the statement of Miss Otto that she relied on the defendant Norris' assurance as to the house being well built, and that she would not have bought but for that assurance. Mr. Norris admitted that he so assured her that the house was well built : he says that it was a serious statement, which he knew would influence her mind, and that he intended her to believe that he was selling a well built house and intended her to think that he was promising that it was a well built house. I have no doubt that this statement amounted to a warranty.

In *Heilbut, Symons & Co.* v. *Buckleton* (4) Lord Moulton lays down the test as to this. He approves a very relevant passage from the judgment of A. L. Smith M.R. in *De Lassalle* v. *Guildford* (5), in which he said : " To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it." The passage which follows, " In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant," has been expressly disapproved, but the earlier part of what I read was approved in *Heilbut's* case (1), and, I think, lays down the true test. I have no doubt here that the statement amounted to a warranty. I am quite satisfied that Mr. Norris intended it to be a contractual promise collateral to the contract of purchase. I am satisfied that he knew that the contract was entered into on the basis of this assurance that he had given, and I am sure that Miss Otto believed the assurance, and in her turn accepted it as the basis of the contract, and on the strength of it signed the contract of September 8, and ultimately completed.

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(1) [1932] 1 K. B. 458, 468.

(2) [1932] A. C. 562.

(3) (1883) 11 Q. B. D. 503.

(4) [1913] A. C. 30, 49, 51.

(5) [1901] 2 K. B. 215, 221.

[The learned judge then discussed the evidence as to the fall of the ceilings in the house after the plaintiffs had entered, and continued:] I find that the first floor ceilings were very badly built and were dangerous to persons who slept in the house. I find that the men who did the work knew it was bad and must have known it was dangerous. The primary negligence was doubtless that of the men doing the work, but the defendants retained the duty of supplying the material and supervising the mixing, and examining the work when finished. Their foreman, Mr. Norris, Jun., was negligent in his supervision and examination of the mixing, and he and Mr. Norris, Sen., and Mr. Bolton were all negligent in their examination of the work afterwards. If they did not know of the bad work and of its danger, it was owing to the negligent and insufficient supervision of the mixing, and the negligent and insufficient examination of the work when finished. I find as a fact that all the falls were solely due to the bad construction of the ceilings, and that the work claimed for was necessary. I see no reason for saying that more money has been spent on the work than was necessary. I am not satisfied that more than two months was reasonably necessary for doing this work, and I think that I ought not to allow more than two-thirds of the rent of the rooms which were taken. Therefore, on that view of the claim, I think that Miss Otto is entitled to the sum of 340*l*.

The claim of Mrs. Otto is based upon the negligence of the defendants as builders of the house. This claim raises the very difficult question whether the builder of a house, which he is

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(1) [1913] A. C. 30, 49, 51.

1936

OTTO
v.
BOLTON
AND
NORRIS.

Atkinson J.

building for the purpose of sale, is under any obligation towards persons who may come to live in it, to take reasonable care in the building. It is settled law that the vendor of a house, even if also the builder of it, gives no implied warranty as to its safety. A purchaser can make any examination he likes, either by himself or by somebody better qualified so to do. He can take it or leave it, but if he takes it, he takes it as he finds it. It is, perhaps, the strongest example of the application of the maxim "caveat emptor." I can find in no case any suggestion that a builder selling a house after completion is, in his capacity of builder, under any obligation to take care towards a future purchaser, let alone other persons who may come to live in it.

I need refer only to three cases. The first of these is *Collis* v. *Selden* (1), in which a claim was made for the negligent hanging of a chandelier in a public-house. I need not trouble with the details, but I will read one passage from the judgment of Willes J.: "Take the case of a man building a house. His workpeople scamp the work: and five or six years afterwards a chimney-stack falls down through a high wind, and injures a person with whom he has no contract, to whom he owes no duty, and as against whom he cannot have been guilty of any fraud. To hold him liable to an action at the suit of the injured person would be going far beyond anything which has been decided in our law." *Malone* v. *Laskey* (2) dealt with the liability of a landlord for injury happening to a stranger during the tenancy, owing to negligent work by one of his workmen; it was held that there was no such relationship as would enable the injured person to found an action of negligence. But the case which is really conclusive on this matter, subject to the question whether it has been modified by the two recent cases in the House of Lords, is *Bottomley* v. *Bannister*. (3) There the precise point was raised, and was discussed. A firm of builders had built several houses on an estate, of which they were the owners, and they had sold one of these houses to a man named Bottomley, and had agreed to decorate it. He was allowed to go into possession as tenant at will pending the execution of the deeds and the completion of the work of decorating. A boiler had been fitted in the kitchen which was heated by a gas burner, and above this kitchen was a bathroom. No flue had been fixed to carry the gas or fumes from the burner to the outward air, and, while these people were in occupation, the husband and his wife were found dead, poisoned by the gas. This was an action brought by their child under the Fatal Accidents Act, 1846, and the jury had found that the boiler, as constructed, was dangerous. Hawke J. treated this as a finding of negligence and gave judgment for the plaintiff. In his judgment Scrutton L.J. said this: "Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence." It may very well be that at that point in his judgment he is only dealing with contract, but he continues: "There remained a claim in tort based on the cases which consider the circumstances under which a person in control of a dangerous thing is liable to persons with whom he has no contract. They have often been discussed." Then he considers several of the cases, and goes on: "But these are all cases relating to chattels, and appear to me not to apply to real property or fixtures forming part of houses." Later on he says: "My view of the law is that the installation being part of the realty, the cases as to chattels do not apply." Then Greer L.J. lays down the law very clearly. He points out that there can never be a claim for negligence unless you can find that there was a duty. Negligence means a breach of duty, and therefore there must be a duty. He says (1): "The important question for determination is whether it was established that there was any breach of duty by the defendants towards the plaintiffs. Does the vendor or lessor of a house owe any duty, independently of contract, to persons who may happen to come to live in the house either by purchase from him, or as his tenants, to exercise reasonable care to see that the house is fit for occupation?"

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(1) (1868) L. R. 3 C. P. 495.

(2) [1907] 2 K. B. 141.

(3) [1932] 1 K. B. 458, 468, 469, 470, 474.

(1) [1932] 1 K. B. 476, 477.

There is the precise question asked. Then he goes on: "It is a commonplace of the law of negligence that before you can establish liability for negligence you must first show that the law recognizes some duty towards the person who puts forward the claim. The plaintiffs in this action alleged that the defendants were guilty of a negligent breach of duty towards the deceased in that they failed to attach to the Halliday boiler a flue to carry off the poisonous fumes through the wall into the open air. When the defendants installed the boiler they had not then and might never have had any relations with the deceased. English law does not recognize a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one's carelessness. The customer owes a duty to his bank to draw his cheques carefully so that it will be difficult for any holder fraudulently to alter them, but he owes no such duty to every person into whose hands the cheques may come." Then he gives another illustration or so, and goes on: "It seems to me that this principle equally applies to the case of a builder or other owner of property, when the question is whether he owes any duty towards people who may with his consent either as purchasers, tenants, or licensees of purchasers or tenants, come on to his property and be damaged by its defective condition." He then refers to *Cavalier* v. *Pope* (1); *Robbins* v. *Jones* (2); and *Lane* v. *Cox* (3), and says: "A purchaser of the freehold is, in my judgment, in no better position than a tenant. No case was cited to us in which a tenant or purchaser has ever recovered against a lessor or vendor, either by implied contract or in tort, by establishing the liability of the vendor or landlord for injuries sustained through the house or its fixtures being unsafe at the date of the sale or of the lease." Now unless the law there laid down has clearly and plainly been declared to be wrong in *Donoghue* v. *Stevenson* (4) it is, of course, binding upon me. That was a case dealing with chattels, and there is not a word in the case from beginning to end which indicates that the law relating to the building and sale of houses is the same as that relating to the

(1) [1906] A. C. 428.
(2) (1863) 15 C. B. (N. S.) 221.
(3) [1897] 1 Q. B. 415.
(4) [1932] A. C. 562, 597, 598.

manufacture and sale of chattels. *Bottomley* v. *Bannister* (1) is, in fact, referred to by Lord Atkin without any relevant criticism. Clearly, contractually, the law is different, in that on the sale of a chattel there may be, and very often is, an implied warranty of fitness, but there is never an implied warranty of fitness in the case of the sale of a house. There is a significant passage in Lord Atkin's speech referring to *Cavalier* v. *Pope*. (2) He says: "The wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the non-repair of the house, on the ground that the landlord had contracted with her husband to repair the house. It was held that the wife was not a party to the contract, and that the well known absence of any duty in respect of the letting an unfurnished house prevented her from relying on any cause of action for negligence." Therefore, that is the first difficulty about the suggestion that *Bottomley* v. *Bannister* (1) must be taken to be modified. But supposing that counsel for the plaintiffs are right in saying that the principle of *Donoghue* v. *Stevenson* (3) applies to realty as well as to chattels; if that be so, it is necessary to determine exactly what the principle is that was laid down in *Donoghue* v. *Stevenson*. (4) As I understand it, it is that a manufacturer of products is under a duty to take care that they shall not be harmful to the consumer or user if the relationship between them is sufficiently proximate. There was no exhaustive definition of sufficient proximity, but one test was very clearly indicated, the absence of any reasonable possibility of intermediate examination. A passage from *Heaven* v. *Pender* (5) in the judgment of Lord Esher is quoted, and I will take it from there rather than from the case itself. Dealing with the question of proximity he says: "'This' (that is, the rule he has just formulated) 'includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property.' " Then Lord Atkin goes on : " I draw particular attention to the fact that Lord Esher emphasizes the necessity of goods having to be ' used immediately ' and ' used at once before a reasonable opportunity of inspection.' This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed." Again, referring to a Scotch case, *Oliver* v. *Saddler & Co.* (1), Lord Atkin says (2) : " I find no trace of the doctrine of invitation in the opinions expressed in this House, of which mine was one : the decision was based upon the fact that the direct relations established, especially the circumstance that the injured porter had no opportunity of independent examination, gave rise to a duty to be careful." Lord Atkin also refers to the opportunity of inspection, in dealing with *Caledonian Ry. Co.* v. *Mulholland* (3) : " There was ample opportunity for inspection by the second Railway Company. The relations were not proximate." Then he sums it up (4) : " My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." Lord Thankerton makes the same point. He says: "The special circumstances from which the appellant claims that such a relationship of duty should be inferred may, I think, be stated thus—namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer." Lord Macmillan points out that in an American case, *MacPherson* v. *Buick Motor Co.* (1), Cardozo J. had emphasized the point that the user of a motor-car, or people whom he takes with him, have no opportunity of testing, and he puts his own view as follows (2): "It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user," and then goes on to say that in the present case the manufacturer takes steps to ensure particularly that there cannot be any effective examination. I think that the principle really laid down there is that there can be no duty without proximate relationship, and that, at any rate, one of the main tests as to whether proximate relationship exists, is whether there is reasonable opportunity for examination between the time of the sale or the doing of the work, and the use or consumption of the article by the purchaser.

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(1) [1932] 1 K. B. 458.

(2) [1906] A. C. 428.

(3) [1932] A. C. 562, 597, 598.

(4) Ibid. 581.

(5) 11 Q. B. D. 503, 509.

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(1) [1929] A. C. 584.

(2) [1932] A. C. 586.

(3) [1898] A. C. 216.

(4) [1932] A. C. 599.

In *Farr* v. *Butters Bros. & Co.* (3), decided by the Court of Appeal since *Donoghue* v. *Stevenson* (4), Scrutton L.J. extracts

(1) (1916) 217 N. Y. 382, 385.
(2) [1932] A. C. 622.
(3) [1932] 2 K. B. 606, 614, 615.
(4) [1932] A. C. 562.

1936
OTTO
v.
BOLTON
AND
NORRIS.
Atkinson J.

precisely this principle from the case. Dealing with that case, he said: "There was thus no opportunity of independent examination between the manufacturer and the consumer. That proximate relationship, according to the three law lords who constituted the majority, created the liability of the manufacturer." Then, following his quotation from Lord Thankerton, he goes on: "There, obviously, the liability is rested upon the fact that the manufacturer sends out the ginger-beer in such a condition that it cannot be inspected until it is consumed. The impossibility of intermediate examination makes the relation so proximate that there is a liability." Now even if this principle does apply to buildings which are sold by the man who has built them, it seems to me that it would still be impossible to hold that there was the necessary proximity between the defendants and Mrs. Otto. There was nothing to prevent examination of the house on the intermediate purchase. Indeed, the well known absence of any duty in respect of the sale of a house makes examination usual and likely. The defect was not hidden or latent; the blobs were there plainly to be seen and would have put anybody, making a proper inspection, on his guard. In fact, there was an examination, although an inadequate one, by the person who made a report on September 21 or 22 to Miss Otto's solicitors. I think the remarks of Greer L.J. in *Bottomley* v. *Bannister* (1) are absolutely relevant and are unqualified by anything said in *Donoghue* v. *Stevenson*. (2) Therefore, although I say so with great regret, I am bound by the law as laid down in that case to hold that Mrs. Otto's claim fails.

The result is that there must be judgment for Miss Otto for 340*l*., and there must be judgment for the defendants against Mrs. Otto.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co.*
Solicitors for defendants: *Stanley Evans & Co.*

(1) [1932] 1 K. B. 458, 476.

(2) [1932] A.C. 562.

F. P. F.

FENTON'S TRUSTEE *v.* COMMISSIONERS OF INLAND REVENUE.

C. A.

1935
Dec. 6, 9, 10,

1936
Jan. 24.

Revenue—Income Tax—Loan by Bank—Interest debited by Bank to Loan Account—Application by borrower to recover Income Tax on interest so debited—Payment of interest "out of profits or gains brought into charge to tax"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 36, *sub-s.* 1.

By the Income Tax Act, 1918, s. 36, sub-s. 1: "Where interest payable in the United Kingdom on an advance from a bank carrying on a bonâ fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the Special Commissioners, to repayment of tax on the amount of the interest."

In 1918 F. borrowed from a bank 250,000*l.* on the security of certain property. At the date of hearing of an assessment before the Special Commissioners in 1934 nothing had been paid on that loan account in reduction of principal or interest, the interest having been debited each half-year and added to the principal. In consequence of the addition to the debt of these sums the debit balance stood at 302,973*l.* The appellant, who was the surviving trustee of the estate of F., which was being administered under two deeds of arrangement, claimed repayment of the income tax on the interest for the year ending April 5, 1921, under s. 36 of Income Tax Act, 1918:—

Held, by the Court of Appeal (Greene L.J. dissenting), affirming the decision of Finlay J., that although the interest must be deemed to have been paid by F. to the bank, it was not paid by him "out of profits or gains brought into charge to tax" within the meaning of s. 36 but out of money lent to him by the bank for the purpose of making that payment, and that the appellant was not therefore entitled to repayment of the tax.

APPEAL from a decision of Finlay J. on a Case stated by the Special Commissioners of Income Tax.

The following statement of facts is taken from the judgment of Lord Wright M.R.:—

"This is an appeal from a judgment of Finlay J., who confirmed the decision of the Commissioners for Special Purposes of the Income Tax Acts.

The appellant is the surviving trustee of the estate of Henry Fenton, which is being administered under two deeds of arrangement. He claimed repayment of income tax for the years ending respectively April 5, 1921, and April 5, 1922, under s. 36 of the Income Tax Act, 1918, which is in the following terms: '(1.) Where interest payable in the United Kingdom on an advance from a bank carrying on a bonâ fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the Special Commissioners, to repayment of tax on the amount of the interest.' It will be convenient for the purposes of this judgment to deal only with the former period, which involves all the facts necessary to determine the question of principle involved.

The facts are set out in the Case stated by the Special Commissioners, and are in substance as follows. Henry Fenton had a total income for the relevant year of 26,301*l.*, computed in the manner provided by the Acts and taxed either by deduction or by direct assessment. Out of the income certain charges were paid—namely, 1506*l.* for ground rent and loan interest paid under deduction of tax, and 17,018*l.* for bank interest on loan accounts with banks other than the bank mentioned below. This bank interest was paid without deduction of tax, and in respect of these interest payments claims for repayment of tax made under s. 36 were admitted. That left a balance of income over these charges of 7777*l.* It was in respect of that sum that the claim for repayment of income tax now in dispute was made.

The Case states that Fenton had borrowed various sums on loan account from the Halifax Commercial Banking Company, Ld., now Martins Bank Ld. The most important of these loan accounts, and the only one which need be considered here, is that called the Labrador Account. The others are similar in character, and need not be individually discussed. In 1918 Fenton borrowed from the bank 250,000*l.* on the security of the Mingan Estate, Labrador. The Case finds that up to the date of the hearing before the Special Commissioners nothing had been paid on that account in reduction of principal or interest, the charges, including the interest, having been debited each half-year and added to the principal. In consequence of the addition to the debt of these sums from time to time by June 30, 1921, the debit balance of the account stood at 302,973*l.* 2*s.* 8*d.* The bank certified that the amount charged as interest for the year 1920–1921 to the Labrador Account was 22,402*l.* 4*s.* 7*d.* The certificate did not certify that any payment had been made. The account, headed 'Labrador Account,' which appears to be the account as kept by the bank, shows at each half-yearly period the debit balance carried forward, then at the end of the period shows the charges (that is the interest) and cable expenses, which are added as further debits, and the increased balance is carried forward to the next half-year. The various accounts in respect of which interest was not only charged but paid were with banks other than the Halifax Bank. No question arises in regard to these accounts, claims for repayment under s. 36 having been duly admitted. It does not appear in what form Fenton kept his accounts. There is nothing in the Case stated to show what was done with the balance of income of 7777*l.*, but it is not and could not be suggested that it was in fact employed in any sense in connection with the interest on the Labrador Account."

It was contended on behalf of the appellant: (I.) that, in view of the bank's practice of adding the interest of each half-year to the amount advanced, the interest in question had in fact and in law been paid each half-year, and (2.) that, to the extent that Fenton had taxed income for the year in question the interest must be deemed to have been paid out of profits or gains brought into charge to tax within the meaning of s. 36 of the Income Tax Act, 1918. On behalf of the Crown it was contended (I.) that the interest debited to the accounts had not been paid within the meaning of s. 36 of the Act of 1918; (2.) that alternatively the interest had not been paid out of profits or gains brought into charge to tax but had been paid out of further advances from the bank.

The Commissioners held, with regard to the Labrador

Account and the other accounts where the interest had been debited to the loan account and that account had not been paid off, that even if the interest had in fact been paid, it was not paid out of profits or gains charged to income tax but had been paid out of further advances from the bank in question, and that the claims in that respect failed.

Finlay J. affirmed the decision of the Commissioners.

The appellant appealed. The appeal was heard on December 6, 9 and 10, 1935.

Raymond Needham K.C. and *F. H. Talbot* for the appellant. The real test whether interest on the loan from the bank was paid out of income brought into charge to tax so as to give the appellant a right under s. 36 of the Income Tax Act, 1918, to repayment of tax, is whether there was taxed income in hand available for the purpose: *Attorney-General* v. *Metropolitan Board.* (1) As interest was added every half-year to the amount of the loan, it must be deemed to have been paid for all purposes: *Inland Revenue Commissioners* v. *Holder.* (2) Thus the bank could no longer sue for interest. No distinction then can properly be drawn, as has been done here, between the case where the bank account was put into credit by the borrower and the interest so paid and a case where the interest is added to capital so as to increase the loan. The Crown's contention in the present case involves the view that r. 21 and not r. 19 of the All Schedules Rules applies. It must be remembered that the bank carries in the interest on loans as part of its trading receipts and pays tax on it and, if so, the tax ought not in this case to be payable by the borrower also; and yet that would be the result of a decision against the appellant: compare *W. H. Muller & Co. (London), Ld.* v. *Inland Revenue Commissioners* (3), which shows that the true intention of s. 36 is to secure payment of tax by the bank only.

In view of the authorities, the interest must be treated as having been paid out of taxed income, for when a taxpayer has taxed income he must be treated as having paid interest on loans out of it: *London County Council* v. *Attorney-General* (1) and compare also *Edinburgh Life Assurance Co.* v. *Lord-Advocate.* (2) It is immaterial where the interest comes from. There is no rule affecting individuals corresponding to that affecting corporate bodies which have many activities and separate funds in regard to each. There the question arises whether the interest in question could lawfully be paid out of a particular taxed fund: *Sugden* v. *Leeds Corporation* (3); *Dickson* v. *Hampstead Borough Council* (4); *Birmingham Corporation* v. *Inland Revenue Commissioners.* (5) The first case in which an individual was involved is *Earl of Carnarvon* v. *Inland Revenue Commissioners* (6), where payment of interest on a loan made by way of an additional loan was treated as paid out of taxed income: see also *Marland* v. *Inland Revenue Commissioners.* (7) *Central London Ry. Co.* v. *Inland Revenue Commissioners* (8) is the special case of a company having a statutory right to pay interest out of capital and doing so in order to have income for payment of dividends. As regards an individual it is sufficient that there should be taxed income out of which the interest could have been paid to create a right to repayment of tax under s. 36 of the Act.

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(1) [1928] 1 K. B. 833.
(2) [1931] 2 K. B. 81.
(3) (1928) 14 Tax Cas. 116.

Sir Donald Somervell S.-G. and *R. P. Hills* for the Commissioners. The only payment of interest on which the appellant relies here is a payment by way of an advance made by the bank for the purpose to the borrower. The result of that is that the interest is to be deemed to be paid by the borrower: *Inland Revenue Commissioners* v. *Holder.* (9) But that does not mean that the interest is paid out of income brought into charge to tax; the only source of payment was from an advance made to the borrower.

The Court will have regard to what was in fact done by the parties and to all the circumstances of the case: *Central London Ry.* v. *Inland Revenue Commissioners.* (8)

(1) [1901] A. C. 26.
(2) [1910] A. C. 143.
(3) [1914] A. C. 483.
(4) (1927) 11 Tax Cas. 691.
(5) [1930] A. C. 307.
(6) (1934) 19 Tax Cas. 455.
(7) (1934) 19 Tax Cas. 467.
(8) (1934) 151 L. T. 333.
(9) [1931] 2 K. B. 81.

C. A.
1935

FENTON'S TRUSTEE
v.
INLAND REVENUE COMMISSIONERS.

The cases show that the taxpayer is not bound to show specific appropriation in his books, but he must show that the interest paid was paid out of profits or gains brought into charge to tax. Here nothing in fact passed from resources in Fenton's hands to the bank. The legal effect of the transaction was a payment of interest out of money advanced by the bank for the purpose of that payment.

[They also referred to *In re Jauncey* (1); *In re Morris* (2); *Attorney-General* v. *Metropolitan Water Board* (3); *Sugden* v. *Leeds Corporation* (4); *Dickson* v. *Hampstead Borough Council* (5); *Birmingham Corporation* v. *Inland Revenue Commissioners.* (6)]

Raymond Needham K.C. replied.

Cur. adv. vult.

1936. Jan. 24. The following judgments were read:—

LORD WRIGHT M.R. stated the facts as above set out and continued: The appellant claims to bring himself within the terms of s. 36, on the ground that (1.) he has paid interest in the United Kingdom on an advance from a bank without deduction of tax, and (2.) that he has so paid the interest out of profit or gains brought into charge to tax. He does not claim repayment in respect of the whole 22,402*l.*, but only in respect of the 7777*l.*; that is, the balance of income left after satisfying the interest due to the other banks. As to the residue, he concedes that it was not paid out of profit or gains brought into charge to tax. In regard to the first question, that is, whether the interest has been paid, it might at first sight appear that the interest has not been paid at all but has been capitalized by being added as an accretion to the debt. It might appear proper to apply to this case the words of Russell J. in *In re Jauncey* (7), where he says " the interest is not capitalized because it is in fact paid, but because it has in fact not been paid." That was a case not involving accounts between banker and customer but between mortgagor and mortgagee. It has, however, been admitted and assumed for the purposes of this case on all hands in this Court that the interest charges have been paid or are deemed to have been paid. In *Inland Revenue Commissioners* v. *Holder* (1) this Court held that under s. 36 where an account was kept between banker and customer in the same way as the Labrador Account, the customer must, in the words of Romer L.J. (2): " be deemed to have paid each half-year the accruing interest by means of an advance made for that purpose by the bank to the company." Romer L.J. explained that such a method of keeping accounts was regulated not by any special agreement but by the ordinary usage prevailing between bankers and customers; and he goes on to say that " though an agreement for charging compound interest was illegal as being usurious it was not illegal for the parties to strike a balance at any particular time without any antecedent agreement to do so, and then agree that such balance should continue on loan at interest for a further period." Where these were the circumstances this Court accordingly held that they should apply the view of Lord Cowan in *Reddie* v. *Williamson.* (3) Lord Cowan said: " The true view is, that the periodical interest at the end of each year is a debt to be then paid, and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank." On appeal to the House of Lords (4) the decision was affirmed on other grounds, and their Lordships expressed no opinion on the question (as stated by Lord Atkin (5)) whether " by adding interest to the advance at the end of each half-yearly 'rest' the interest is in fact paid." Accepting the authority of this decision, I shall proceed on the footing that the interest in question has been paid, or, as it is put, " deemed to be paid," within the meaning of s. 36 of the Act, though it may be noted that the

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(1) [1926] 1 Ch. 471, 474.
(2) [1922] 1 Ch. 126, 134.
(3) [1928] 1 K. B. 833.
(4) [1914] A. C. 483, 503.
(5) [1927] 11 Tax Cas. 691.
(6) [1930] A. C. 307.
(7) [1926] 1 Ch. 471, 476.

(1) [1931] 2 K. B. 81.
(2) Ibid. 100.
(3) (1863) 1 Macph. 228, 238 (S. C.)
(4) [1932] A. C. 624.
(5) Ibid. 629.

words "deemed to be paid" do not appear in the section.

That leaves to be determined the second question, which has been strenuously argued on both sides, whether the payment of interest was "out of profits or gains brought into charge to tax." At first sight this might seem to involve a travesty of the facts, but it is contended on behalf of the appellant that if or to the extent that the taxpayer has paid for the relevant period tax on profits or gains he can avail himself of that payment to "cover" (that was the phrase used) for tax the bank interest and bring it within s. 36 so as to found a claim for repayment of the tax under the section. This, it is admitted, can only be done to the extent that such profits and gains have not been in fact exhausted for the payment of other bank interest or similar charges: hence the claim is here limited to the balance left, the sum of 7777*l.*, as to the disposal of which nothing is known except that no part of it was used or could have been used to pay interest on the Labrador Account. The decision of the Special Commissioners was that "With regard to the Labrador Account and the other accounts where the interest has been debited to the loan account and that account has not been paid off, we hold that, even if the interest had in fact been paid, it was not paid out of profits and gains charged to income tax but had been paid out of further advances from the bank in question. The claim in this respect fails." With that decision Finlay J. agreed.

A number of cases were cited as throwing light on the construction of s. 36 so far as relevant to the question at issue. These were cases dealing with rr. 19 and 21 of the All Schedules Rules scheduled to the Act of 1918. But these rr. 19 and 21 do not apply to other than annual payment of interest and so forth, and hence it was necessary to have the further provisions now embodied in s. 36 in order to deal with (inter alia) interest payable to banks on advances, on which the interest would not normally be due yearly but for half-yearly periods or other broken periods. Sect. 36 does not authorize or require tax to be deducted; it assumes that payment is made without deduction of tax, and gives a right of repayment of the

C. A.
1936

FENTON'S TRUSTEE v. INLAND REVENUE COMMISSIONERS.

Lord Wright M.R.

appropriate tax provided that the interest has been paid out of income brought into charge for tax. The principle involved is that the interest paid is to be deemed income, not of the payer, but of the recipient, and hence, if the payer has paid tax on it, he is entitled to repayment from the Revenue authorities, who otherwise would be getting tax twice over for the same sum of interest from payer and recipient, whereas the tax is only due once, and is due from the recipient whose income it is deemed to be. But this reasoning does not apply if the money which the payer uses to pay the tax is capital or borrowed money and so forth which in his hands has never been brought into charge as income. Hence the two conditions which the section specifies as necessary to a claim for repayment. The same principles are involved in rr. 19 and 21, but in these rules provision is made for the tax being deducted by the payer when he pays the recipient, with the corresponding condition that if the interest is payable in whole or in part out of profits and gains not brought into charge, the payer is liable to account to the Revenue for the tax so deducted; otherwise he is entitled to retain what he had deducted because he has already paid the tax himself. Hence questions have arisen under the rr. 19 and 21 or under the corresponding provisions of earlier Revenue Acts, whether interest was "payable and was in fact paid wholly or in part out of profit and gains brought into charge." I quote the question as stated by Lord Buckmaster in *Birmingham Corporation* v. *Inland Revenue Commissioners*. (1) This and other cases to some of which I shall refer have been relied on by both sides as affording guidance for the construction of s. 36.

The Special Case either finds as a fact or holds that in respect of the sum in regard to which it is claimed that tax should be repaid there has been no payment of interest out of profit and gains brought into charge, but that the payment has been made out of further advances from the bank. The appellant, however, contends that on the facts set out in the Case the contrary decision must be arrived at as a matter of law. The rule of law contended for, as I understand it, is

(1) [1930] A. C. 307, at p. 309.

C. A.
1936

FENTON'S TRUSTEE v. INLAND REVENUE COMMISSIONERS.

Lord Wright M.R.

that payments are in law to be treated as made out of the taxed fund (if I may for convenience use that expression to describe profits and gains brought into charge for tax), if there is any taxed fund which might have been used for the payment, however clear it may be that such taxed fund was not so used but that the payment of interest was made from other sources, and was made in such shape as to be inconsistent with payment from any taxed fund. In other words, so the contention runs, the only relevant question in a case like the present is, were there for the relevant year profits and gains brought into charge which were available to be used for the interest payment or some part ? If so (subject only in the case of corporations to questions of ultra vires or illegality) no further inquiry into the facts is competent : the right to repayment of tax is ipso facto conclusively in law established, however contrary that conclusion may be to fact and evidence. The rule of law, it is contended, is that the availability of taxed income " covers " the interest, as far as the taxed income will go.

I have been unable to find any authority to justify this contention to the full extent claimed ; and there seem to me to be both dicta and at least one decision to the contrary purport. It is true that it has been laid down more than once by the House of Lords that where there is what is called a mixed fund, consisting partly of taxed and partly of untaxed moneys, and the interest is paid out of that fund, without the source being earmarked or distinguished as between taxed and untaxed, the taxpayer is entitled to attribute the payment to the taxed moneys, so as to obtain the benefit of r. 19. The same must equally be true of s. 36 ; that is, subject to questions of illegality. I am aware that the word " fund " or the word " moneys " is rather metaphorical than accurate in these days of credit dealings, where practically everything is matter of debits or credits in account ; and in particular " taxed fund " is inaccurate if it is applied to the balance of profits and gains computed for income tax : there is in truth no such fund ; there is merely a notional computation and an account. But the expressions are constantly used, are convenient, and do not really mislead. In the ordinary course, a person paying interest does not generally appropriate the payment to income or to any particular piece of income or any specific asset: he has the general body of available funds, say his banking account, if he has only one, and he pays by drawings on that account, which may include income, borrowed money, capital and so forth. This is what is meant by payment out of a mixed fund, or payments made out of the general till, or payments made neutrally. The Revenue authorities have no right in such cases to appropriate those payments to non-taxable rather than taxable moneys. Hence the taxpayer is given the right of attribution in the way most favourable to himself. It is presumed, in the absence of evidence to the contrary, that payments are made out of income. This right of attribution, as it has been called, has been frequently stated. I may quote the statement by Lord Atkinson in *Sugden* v. *Leeds Corporation* (1): "In case a mixed fund be formed from two funds, out of either of which the interest and dividends charged with the tax may lawfully be paid, you are to assume, in the absence of evidence to the contrary, that they have been paid from that portion of the mixed fund out of which they should be paid in the due course of administration, which due course is this, 'that annual charges should, in the first place, be paid out of annual income.'" The words "in the absence of evidence to the contrary" are to be noted. I may also quote what was said by Lord Sumner in the *Birmingham Corporation* case (2): "Neither as a matter of handing over identical currency nor of making specific appropriations in the books beforehand has there been any actual payment of the interest out of profits, but the decisions, I think, clearly contemplate that a mere attribution ex post facto, as part of a contention as to their rights, will serve the Corporation's turn without even an ultimate attribution in their books." Then the learned Lord goes on to decide in that case that the claim that the interest should have been paid out of profits already brought into charge,

(1) [1914] A. C. 483, 504.

(2) [1930] A. C. 307, 318.

in view of the Housing Act in question, " neither squares with the statutory relations resulting from this Act, nor is consistent with any tolerable working of it."

I need not refer further to the authorities. But the principle is well established that this right of attribution does not exist where, as in *Sugden's* case (1), though the payment of interest is made out of a mixed fund which includes both taxed and untaxed moneys, it is unlawful or ultra vires to use for the payment the taxed funds : the payment can only be attributed to the taxed funds if or in so far as it is legitimate to use them for that purpose. In the *Birmingham* case (2), where the right of attribution to taxed funds was in part negatived, Lord Sumner puts as the reason of his decision that it was " unlawful in the sense of being negatived by the whole tenor of the Act, to retain the tax deducted." Lord Atkin, however, puts his decision on another ground. In his opinion it was lawful for the Corporation to pay the interest either out of the taxed or untaxed funds, but he found in the conduct of the Corporation proof that the interest was paid out of untaxed funds. The untaxed funds consisted of the subsidy paid by the Government to make up the deficiency on the Housing Scheme which was regulated by statute ; and Lord Atkin bases himself on the form of the accounts adopted, not as mere accounting but as a matter of substance and as evidence of matters of fact inconsistent with the attribution. Thus, he says (3) : " But in preparing the account for the subsidy under the regulations they return the amount required for interest as the full amount without deduction ; and they give no credit for and make no reference to the deduction. The account is prepared for the purpose of ascertaining the loss on the Housing Scheme, and in these circumstances it must, I think, be taken that the Corporation are representing that they are out of pocket the full amount of the interest, or, in other words, that they have no right to keep for themselves the income tax deducted. This can only be on the footing that they have in fact paid the interest out of their untaxed funds. I do not

(1) [1914] A. C. 483.
(2) [1930] A. C. 307, 317.
(3) Ibid. 320.

think that it is necessary to involve the principles of estoppel, even if the necessary conditions for an estoppel exist, as to which I say nothing. The effect of the form of the account, charging the gross amount of interest as an element of loss intended to result in receipt of a subsidy and followed by the actual receipt of the money based upon the representations contained in it, is to afford to my mind conclusive proof that the Corporation in fact paid the interest out of untaxed funds." This method of reasoning is in my opinion inconsistent with there being any rule of law of the full amplitude for which the appellant contends. It imports an exception to the rule other than that of illegality or ultra vires. So also does another authority to which the Court have been referred: *Central London Ry.* v. *Inland Revenue Commissioners.* (1) The company there was authorized by its special Act to pay interest on debentures, if they so chose, out of capital. Part of the interest was taken out of capital account. It was contended that for the purposes of rr. 19 and 21 that part was still to be treated as paid out of income charged to tax, because it was legally competent for the company to pay it out of that income, and hence the company were entitled so to attribute the payment. This Court rejected that contention. Romer L.J. (2) thus summed up his conclusion : " Where, not for the purposes of convenience or for the purposes of giving effect to the payer's own notions of account keeping—not for that purpose, but for the purpose of definitely deciding and of recording the fact that a decision has been come to that a certain payment of interest is to be paid out of capital and not out of interest, then the account is not only of great importance, but, in the absence of evidence to the contrary, is conclusive upon the matter. In the present case, a company, not for the purposes of convenience, not for the purposes of indulging in some fancy idea as to the proper method of keeping accounts, has debited this particular payment of interest to capital for the purpose of making it clear that the revenue from which it might otherwise have been deducted is to be free for distribution as dividend." The fact that the taxpayers were a corporation was not material : there was no question of illegality or ultra vires. It was simply in that case that the facts were inconsistent with and excluded a right of the taxpayer to attribute the payment to the taxed fund.

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(1) 151 L. T. 333.

(2) Ibid. 345.

When I seek to apply to the present case the statements of principle which I have just quoted, I first of all find in them a negation of the contention that there is any rule of law which compels the Court to hold that there is in all cases an absolute or universal right to attribute interest payments to income if there is any income available, save only in the case of illegality or ultra vires, or which compels the Court to upset the conclusion of the Special Commissioners here. There is no abstract right of attributing to the taxed fund interest payments merely because a taxed fund is available. The actual facts must in each case be examined : the payment must be neutral : the attribution must not be inconsistent with the evidence : the conduct of the taxpayer must not be inconsistent with the attribution. It is true that there is prima facie a right of the taxpayer to attribute the interest payments in the manner most advantageous to himself in relation to the Revenue authorities. It is not necessary for him to show affirmatively that the payment of the interest was made out of a taxed fund, by appropriation or as a matter of book-keeping. But here there is much more than book-keeping. The facts set out in the Special Case are only consistent with the idea that the interest payments (or what were deemed to be payments) on the Labrador Account were segregated specifically from the balance of taxed income, namely *7777l.*, which was left after paying the interest on the accounts with the other banks. There was in that regard no mixed fund from which the interest could have been paid, and no payment neutrally made. The *7777l.* was kept separate on the face of the account, and the only inference possible is that it was deliberately kept separate not as a matter of book-keeping but in accordance with the fact that it was kept free for other purposes than payment of the Labrador Account. Further, the interest on that account was paid in such a way that it could pro tanto not have been paid by means of the *7777l.* or any part of that. The interest on the

Labrador Account was only paid (or deemed to be paid) by the particular method shown in the account, that is, by money borrowed by way of addition to the debt, and without any income being used to pay it. The appellant, in order to prove the payment, has to invoke the fiction by which what took place is recognized as payment. That fiction is inconsistent with taxed income having been applied to payment. The appellant cannot now turn round and seek to prove the second condition entitling him to repayment by invoking a general right of attributing the interest payments to drawings from the taxed fund when he has already established that they were not so paid. The two conceptions, or (as they may be called) fictions would thus contradict each other. The appellant's manner of proving the interest payment has excluded the idea that it was made from a mixed fund or was neutrally made. In truth, if the method of payment is, for purposes of this case, accepted as payment, it necessarily involves that the money lent by the bank on each half-yearly rest to pay the interest was never available for any other purpose and was from its nature dedicated to that payment and nothing else. By that payment and in no other way was the interest satisfied.

In my judgment, the decision of the Special Commissioners and of Finlay J. should be upheld and the appeal dismissed with costs.

ROMER L.J. The questions that have to be determined on this appeal are (1.) whether the sums of 27,136*l*. 3*s*. 2*d*. and 11,758*l*. 8*s*. 9*d*. charged against Henry Fenton as interest for the years ending April 5, 1921, and April 5, 1922, respectively in his accounts with Martins Bank Ld. and their predecessors in business were paid to them by Henry Fenton within the meaning of s. 36 of the Income Tax Act, 1918; (2.) whether, if paid, they were paid as to the first year to the extent of 7777*l*. and as to the second year to the extent of 2722*l*. out of profits and gains brought into charge, so as to entitle the trustee of Henry Fenton to repayment of the tax on such last-mentioned sums under the section. Of these two questions the former was decided by Finlay J. in favour of the trustee, the learned judge very properly considering himself bound by the decision of this Court in *Inland Revenue Commissioners* v. *Holder* (1) to hold that the interest must be deemed to have been paid from time to time out of sums deemed to have been advanced by the bank to Henry Fenton for that purpose. We are also bound by that decision, to which in fact I was a party, and being so bound we must, as it seems to me, deal with the present case as though at each rest in the accounts, when interest was debited to Henry Fenton and added to capital, the bank made a loan to him of a sum equal to the interest charged and he returned such sum to the bank in discharge of that interest. That being so, the next question to be determined is whether the interest to the extent I have mentioned was paid out of profits or gains brought into charge. It would at first sight seem plain that the answer to this must be in the negative, for the interest was paid by returning to the bank the sum advanced by them for that purpose, and the sum so advanced was not brought into charge. The matter, however, cannot be disposed of quite so easily. It is true that the interest was paid, in the first instance, out of the sums advanced by the bank, but it by no means follows that it must not in the end be deemed to have been paid out of profits and gains brought into charge. In order to answer the question it is necessary to look at some authorities in which the Courts have had to consider the meaning of the words " payable out of profits and gains brought into charge " to be found in rr, 19 and 21 of the General Rules applicable to all Schedules in the Income Tax Act, 1918, and in the statutory predecessors of those enactments. In considering some of these authorities it is not, I think, necessary to go back further than *Sugden* v. *Leeds Corporation* (2) : " If," said Lord Haldane in that case, " the annual profits would properly have been payable out of profits, but the person bound to make them has chosen to defray them out of some other source of income, this does not affect his right to retain the amount of tax he has deducted " ; and a little later : " In each case the question is whether the annual payments taxed are actually and properly payable out of the profits. If they are, these profits are treated by the Acts as diminished pro tanto in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax that he has already paid." By the word "profits" in these passages Lord Haldane meant, of course, profits and gains brought into charge. Lord Atkinson, in the same case, said this (1): "The profits 'and gains brought into charge' may, for convenience, be styled the 'taxed fund,' and all other resources of the debtor may be styled the 'untaxed fund.' The first important question to determine, then, is, what is the meaning of the words 'not payable out of' this taxed fund? They cannot mean, I think, not charged upon the 'taxed fund.' Every professional man who has nothing but his professional income, or tradesman who has nothing but the profits of his trade to live on would be entitled to retain for his own benefit the tax he had deducted from an annuity he had contracted to pay if he had, in fact, paid it out of that income, or those profits, forming the 'taxed fund,' though the annuity were not specially charged on anything. This is, I think, according to the invariable practice. If, then, these words 'not payable out of' do not mean 'not charged upon,' it appears to me they must mean 'not legally payable out of,' that is, which cannot lawfully be paid out of the 'taxed fund.' If the interest or the annuities were in fact, but against the law, paid out of the 'taxed fund,' then, though the tax should be deducted from the creditor, it could not be retained by the debtor. He should account for it to the revenue. Of course, if the interest and annuities be charged upon the taxed fund they will almost necessarily be lawfully payable out of it. This fund might, however, not be charged as the primary security, or some condition might have to be fulfilled, before it could be so applied, in which case payment out of it might be illegal till the first fund was exhausted, or the condition fulfilled. If this be the true view as to the meaning of these words 'not payable out of' then the results of the application of

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(1) [1931] 2 K. B. 81.

(2) [1914] A. C. 483, 491.

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(1) [1914] A. C. 498.

C. A.
1936

FENTON'S TRUSTEE v. INLAND REVENUE COMMISSIONERS.

Romer L.J.

the sub-section would, according to the authorities, apparently be the following:—(1.) Where no portion of the interest or annuities charged with the tax could be lawfully paid out of the 'taxed fund,' the debtor, who on paying this interest or these annuities deducts the appropriate tax from his creditor or creditors, must account to the Commissioners of Inland Revenue for the full amount of the tax so deducted. (2.) When only a portion of this interest or these annuities can lawfully be paid out of the 'taxed fund,' then the debtor, though bound to deduct the tax from his creditors on the full sums paid to them, is only bound to account to the Revenue Authorities for the amount of the tax deducted from that portion of the interest or annuities actually paid out of this untaxed fund. The remainder of the entire sum deducted he is entitled to retain for his own benefit. (3.) When the interest and annuities so charged may with equal legality be paid out of either the 'taxed' or 'untaxed' fund of the debtor, and the taxed fund is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his own benefit the entire sum deducted, that he should have in his books or otherwise specifically appropriated or set apart the taxed fund to discharge this interest or these annuities, or to prove that he had in fact paid them out of the 'taxed fund.' It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be treated as having been paid out of the taxed fund, especially where in the ordinary course of business it should be applied for that purpose." Later in his speech, when commenting upon the judgment of Lord Davey in *London County Council* v. *Attorney-General* (1), he added this (2): "What it is an authority for is, I think, this: (1.) that there is not to be any apportionment of rateability in favour of the Crown between two funds out of either of which the interest or annuities charged with the tax may lawfully be paid; and (2.) that in case a mixed fund be formed from two funds, out of either of which the interest and dividends charged with the tax

(1) [1901] A. C. 26.

(2) [1914] A. C. 483, 504.

may lawfully be paid, you are to assume, in the absence of evidence to the contrary, that they have been paid from that portion of the mixed fund out of which they should be paid in the due course of administration, which due course is this, 'that annual charges should, in the first place, be paid out of annual income.' " I do not think that Lord Atkinson in referring to a mixed fund intended in any way to differ from what Lord Haldane had already said. As I read his judgment the remarks that I have cited were intended to apply whatever fund may have been resorted to in the first instance for discharging the annual payment. In most cases the interest or annuity would no doubt be met by a cheque and in this way paid out of the balance standing to the payer's credit with the bankers, and such balance would in many cases be a mixed fund resulting from the payment into the banking account of moneys derived from various sources both of revenue and capital. Sometimes, however, the payment would be made out of cash in hand or some other fund representing capital alone. But whatever may have been the source from which the annual payment has been made in the first instance, if such payment could lawfully have been made out of profits and gains brought into charge, it is to be assumed in the final adjustment of accounts, and in the absence of evidence to the contrary, that it has been made out of such profits and gains. The assets of a company, for instance, where no particular appropriation has been made, constitute as a rule a mixed fund representing indiscriminately the balance of its capital (whether derived from shares or loans), the money required to discharge its unsecured liabilities, its reserve funds, its receipts on revenue account, and so forth. If in the course of the year a payment falls to be made whether in discharge of a capital or a revenue liability, it can be made in the first instance out of any particular asset regardless of what that asset may be. But in drawing up the balance-sheet at the end of the company's trading year such payment will be charged to the appropriate item on the debit side of the balance-sheet, and in this sense will be properly described as having been made out of capital or reserve or profits and gains, as the case may be. In the

C. A.
1936

FENTON'S TRUSTEE v. INLAND REVENUE COMMISSIONERS.

Romer L.J.

case last put by Lord Atkinson the interest and dividends would be charged against the company's profits and gains, and in that sense can properly be said to have been paid out of the fund representing profits and gains brought into charge. This, however, can only be done where the profits and gains can properly be applied in discharge of the payment, and where the company has not elected to charge them against some other fund, that is to say, some other debit item such as capital or reserve. In the latter case the assumption mentioned by Lord Atkinson will not be made. The company's election will constitute the evidence to the contrary to which he refers. The authorities cited to us furnish many examples of cases where profits and gains or some particular portion of the profits and gains brought into charge could not properly be resorted to in discharging interest on a particular loan, and the assumption could not be made that the interest had been paid out of them. *Sugden* v. *Leeds Corporation* (1) was itself one of them. *Birmingham Corporation* v. *Inland Revenue Commissioners* (2) and *Dickson* v. *Hampstead Borough Council* (3) are others. In the three cases, however, of the *Central London Ry.*, the *London Electric Ry.*, and the *Metropolitan Ry.* respectively v. *Inland Revenue Commissioners* (4), the interest that was there in question could properly have been made out of the profits and gains brought into charge. It was held in this Court, however, that the companies had deliberately elected to charge the interest against capital, as they had power to do, and had thereby furnished such evidence to the contrary as would prevent Lord Atkinson's assumption being made.

Now in the present case Fenton's profits and gains brought into charge could without any question have been properly applied in or towards discharge of the bank interest. The only question, therefore, to be decided is whether Fenton must be deemed to have elected that the interest should nevertheless be charged ultimately against the sums advanced to him from time to time by the bank. I use the words "deemed to have elected" purposely, for it is extremely improbable that he ever consciously directed his mind to the question. In all probability all that he knew was that the bank added the interest half-yearly to the principal sum, and thereafter charged interest upon the aggregate amount. For all that he knew, therefore, the interest was not paid at all. The interest can only be treated as having been paid by assuming that he borrowed money from the bank and discharged the interest out of that money. The whole thing, as Finlay J. said, is very artificial. It is indeed wholly imaginary. But if we are to enter into the realms of imagination for the purpose of solving one part of the problem before us, we must, as it seems to me, remain there until we have solved the problem as a whole. We have, therefore, to imagine that Fenton approached the bank and induced them to lend him half-yearly a sum equal to the interest that had accrued due on the terms that that sum should be added to and for all purposes become part of the principal money advanced, and that he then returned that sum to the bank in discharge of the interest. The fact that an annual payment is made for convenience out of borrowed money would not, as a rule, prevent the payment from being charged ultimately against profits and gains brought into charge. But where, as here, we have to imagine that the interest is paid not out of a sum borrowed independently for general purposes, but out of money borrowed for the express purpose of paying the interest and of the precise amount of the interest and on the terms that it shall form part for all purposes of the principal amount due and that this was not done merely on one occasion but whenever interest fell due, then I think that we must further imagine that Fenton elected that on a final adjustment of accounts the interest should be charged against the money so borrowed and elected that it should not be charged against profits and gains brought into charge.

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(1) [1914] A. C. 483.
(2) [1930] A. C. 307.
(3) 11 Tax Cas. 691.
(4) 151 L. T. 333.

For these reasons, which are in substance those given by Finlay J., I am of opinion that this appeal fails.

GREENE L.J. I regret to find myself in disagreement with the other members of the Court.

C. A.
1936

Fenton's Trustee v. Inland Revenue Commissioners.

Greene L.J.

The general scheme of the Income Tax Act with regard to interest is one which, as was pointed out by Sir Charles Swinfen Eady, when Master of the Rolls, in *Earl Howe* v. *Inland Revenue Commissioners* (1), avoids subjecting the same income to double taxation. In the case of annual interest the machinery by which this is achieved so far as regards income tax involves: (*a*) the prohibition of any deduction on account of annual interest in computing the taxable income of the payer [Income Tax Act, 1918, s. 209, sub-s. 1 (*b*)]; (*b*) the right of the payer when he pays the interest to deduct and retain the tax paid [General Rule 19, sub-r. 1]; (*c*) the exclusion of interest received in computing the taxable income of the recipient. For the purposes of surtax, on the other hand, the payer is entitled to deduct the interest paid whereas the recipient is bound to include it in arriving at his total income. In effect, both in the case of income tax and in the case of surtax, the interest is treated as part of the income of the recipient, the provisions in the case of income tax above referred to being merely machinery. It is obvious that this method of dealing with interest is only suitable where the interest paid is referable to taxable income of the payer. If, for example, a person has no taxable income but has paid interest, the result of excluding the interest from the taxable income of the recipient and permitting the payer to deduct and retain the tax would be that the interest would escape taxation altogether and accordingly provision is made that these provisions are only to apply where the interest is payable (and paid) wholly "out of profits or gains brought into charge to tax." Where the interest is not wholly so payable and paid the payer is bound to deduct a sum representing the tax and is accountable to the Crown for the whole or part of the amount so deducted as the case may be (General Rule 21). These provisions have been held to apply to a case where the assessable income for the year in which payments of interest were made (ascertained by reference to the previous year) was nil, although the actual profits for the year of assessment (on which the assessment for the following year would in due course be based) amounted to a sum greater than the interest paid (*Attorney-General* v. *Metropolitan Water Board* (1)), a decision which, in my judgment, has a very important bearing on the present case.

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(1) [1919] 2 K. B. 336, 344.

Previously to the passing of the Finance Act, 1915, the scheme outlined above did not apply to interest on "short loans" with the result: (*a*) that, as in the case of annual interest, the payer was assessed on his gross profits without any deduction of interest paid; (*b*) he was not entitled to deduct tax on paying the interest; (*c*) the recipient was bound to include the interest which he received for the purpose of calculating his taxable income. This result was an anomalous one. There does not appear to be any difference in principle between annual interest and interest on short loans; in each case the interest paid may be regarded as part of the income of the payer transferred to the recipient as distinguished from a mere expenditure of income by the payer. Nevertheless the result was that the Crown received income tax twice in respect of the interest, once from the payer inasmuch as he was taxed on his gross profits, and once from the recipient in that the sums received had to be brought into account in ascertaining his taxable income. There was, however, this difference, that in the case of banks, at any rate (and I assume that the same applies to stockbrokers and discount houses), the interest received was not taxed as such in their hands but was treated (as it still is) as a receipt in ascertaining the balance of profits of their business.

The anomaly was removed so far as regards banks by the Finance Act, 1915, and as regards members of Stock Exchanges and discount houses by the Finance Act, 1917, and the relevant provisions of those Acts are now incorporated in s. 36 of the Income Tax Act, 1918. In substance the position with regard to interest on short loans is assimilated to that of annual interest. The machinery, however, is different, since, in view of the difference of treatment of the interest in the hands of the recipient to which I have referred, it would have been inconvenient to allow the payer to deduct the tax. The desired result is accordingly achieved by allowing the payer, on proof of the facts being given, to obtain repayment of tax on the amount of interest paid. By this means double taxation is avoided in the case of interest on short loans as it was already avoided in the case of annual interest, and it is I think fair to conclude that this was one of the objects, if not the only object, of the amendments in the law so made. The position of the Crown is safeguarded against the escape of interest from taxation by providing that repayment is only to be made where the interest is " paid . . . . out of profits or gains brought into charge to tax," and it is upon the effect of those words as applied to the facts of the present case that the question to be decided upon this appeal turns.

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(1) [1928] 1 K. B. 833.

In construing these words it is I think legitimate to bear in mind that (to say the least) one important object at which the Legislature was aiming throughout the provisions of the Income Tax Act which deal with interest was to ensure that the Crown should obtain tax once, but only once, in respect of interest. I do not mean by this that the words used are to be misconstrued for the purpose of avoiding double taxation. If the words when properly construed lead to that result it must, of course, be taken that the Legislature so intended. The words " paid out of profits or gains brought into charge " in s. 36 are for all practical purposes the same as those used in General Rules 19 and 21, and accordingly the contentions of the respondents with regard to their construction will, if correct, apply equally to the case of annual interest, and this position was accepted by counsel on their behalf.

I need not recapitulate the facts of this case, which have already been fully stated. In my opinion, upon the authority of the decision of this Court in *Holder's* case (1), the interest in question was " paid." In that case this Court examined the practice of bankers with regard to capitalizing interest, a practice which was followed in the present case, and Romer L.J. said (2) that " the company must be deemed to have paid each half-year the accruing interest by means of an advance made for that purpose by the bank to the company." The learned Solicitor-General argued that this phrase means something less

(1) [1931] 2 K. B. 81. (2) Ibid. 100.

than that the interest was paid. I do not so read it. It seems to me that what this Court was doing in that case was to ascertain from the conduct of the parties the true nature of the contract between them, and that this was that the interest as it accrued due was to be satisfied by a fresh loan made by the bank for the purpose. On this basis there cannot, I think, be any doubt that in the present case the interest was paid within the meaning of s. 36. Nor is there any doubt on the facts that the interest was paid by means of an advance made for the purpose by the bank. The learned Solicitor-General argued that this was conclusive of the present question upon the ground that interest paid by means of an advance made by the bank for the purpose could not be said to have been paid "out of profits or gains brought into charge." This is the point of view accepted by the Special Commissioners in their finding that "even if the interest had in fact been paid, it was not paid out of profits and gains charged to income tax but has been paid out of further advances from the bank." I now proceed to give my reasons for thinking that this finding cannot be supported.

The finding evidently assumes that if interest is "paid out of" money obtained on loan from the bank it cannot be said to have been "paid out of" profits and gains charged to tax, and the learned Solicitor-General agreed, as I think his argument compelled him to agree, that even if the money required to pay the interest had been borrowed from a third person and had been used to pay the bank the taxpayer would not have been entitled to claim repayment of the tax. In my opinion, the fact that interest is paid by means of money borrowed for the purpose is in no way incompatible with its having been paid out of profits and gains brought into charge. Profits and gains brought into charge are in truth not an asset in the sense that money obtained by borrowing is an asset. They are in effect a balance of profits and gains ascertained upon the taking of an account. If the case be taken of a trade or business the balance of profits or gains in respect of which the taxpayer is assessable is arrived at after taking an account of receipts and expenditure in accordance with the provisions of the law relating to income tax. This account is not necessarily the same as the trader's own profit and loss account, nor is the balance of assessable profit necessarily the same as the balance on the profit and loss account, since the deductions which are permissible under the Income Tax Acts are in general different both in scope and in amount from those which the trader would normally take into account in arriving at his profits for his own purposes. Moreover, in the account taken for the purposes of income tax, interest on borrowed money will not anywhere appear since it is not a permissible deduction. The balance of profits or gains, therefore, which is ascertained for income tax purposes is an accountancy figure arrived at in a particular way. It is not represented by any actual sum of money or other specific asset and has no existence otherwise than as a balancing item whose proper place is on the expenditure side of the account. In this respect it resembles the balance of profit appearing in a trader's own profit and loss account.

The impossibility of regarding "profits or gains brought into charge to tax" as something "out of" which interest can be "paid" in any concrete or tangible sense is further illustrated by the fact that in the case, for example, of assessments under Sch. D the amount of the "profits or gains" in respect of which the tax is chargeable is not the actual amount of the profits or gains for the year but a notional amount ascertained by reference to the preceding year. Thus if a trader in the year 1 makes no assessable profits, in the year 2 makes 1000*l.* assessable profit, and in the year 3 again makes no assessable profit but in each of the three years pays 50*l.* in interest, the interest which he pays in the year 2 is not, according to the decision in the *Metropolitan Water Board* case (1), paid out of profits or gains since for that year there are none in the income tax sense, although in fact he has made a profit of 1000*l.* But what of the year 3? In that year his income tax profits or gains are 1000*l.*, his real profit is nil. Now, if it be supposed that he has no other source of income, the only way in which he can pay his interest is by realizing capital or borrowing. But according to the Crown's argument if he used the money so raised to pay the interest he would not be paying it "out of profits or gains brought into charge to tax." It would appear, therefore, that the provisions of r. 19 and s. 36 are of no assistance to him in such a case, and although he has 1000*l.* income tax profits or gains for the year it is impossible for him to "pay" the interest "out of" them.

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(1) *A. G.* v. *Metropolitan Water Board* [1928] 1 K. B. 833; 13 Tax Cas. 294.

In what sense, therefore, can it be said that interest is "paid out of" profits or gains? A borrower pays his interest out of any money available. His balance at the bank at the time when he draws his cheque may consist of money derived from a variety of sources—receipts of his business, realization of capital assets, borrowed money, etc. Indeed he may have no balance and payment may be made out of an overdraft on current account or an advance on loan account. It is only when he comes to make up his accounts for the year (assuming that he does so) that the payment of interest appears (if he so elects to treat it) as a payment on revenue account. But the fact that it so appears or ought to appear or does not appear in his private accounts, in my judgment, has no relevance to the question whether or not the interest is "paid out of profits or gains charged to tax" since such accounts bind neither the Crown nor the taxpayer. The source of the money which he pays in interest has no bearing on the question as to how the payment is to appear in his accounts if and when they are drawn up; and it is to my mind impossible to say that the application of r. 19 and s. 36 depends on whether or not in his own private accounts made out (or deemed to have been made out) for his own private purposes he chooses at the end of the year to charge the sum which he has paid by cheque drawn on his banking account to capital or to revenue. I take the view that a taxpayer who for the purposes of his own private accounts has charged payment of interest to capital is entitled, when he comes to the income tax authorities for assessment, to

C. A.
1936

FENTON'S TRUSTEE v. INLAND REVENUE COMMISSIONERS.

Greene L.J.

treat the payment as a charge against profits up to the amount of his assessable profits, and that he is not in any way precluded from doing this by the manner in which he has chosen to keep his private accounts. Those accounts are kept for one purpose; the accounts made out for income tax are made out for a wholly different purpose. A debtor who is minded to pay his interest out of income does not in his private accounts show the interest as "paid out" of his profits; he strikes his balance of profits after and not before charging interest. In the accounts made out for income tax purposes no corresponding treatment of interest is possible since, as I have already pointed out, interest is not an item which can ever appear in those accounts. Finally, in cases where tax is assessed on the basis of the profits of the preceding year there is no possible comparison between the two accounts; the private accounts for the year in which the interest is paid reflect the real transactions for that year, the accounts for purposes of income tax show transactions which, so far as that year is concerned, are notional; and I am quite unable to see how a taxpayer who in his private accounts for the year in which the interest is really paid has charged the interest to capital can in any way be thereby prevented vis-à-vis the Revenue from treating the interest as "paid out of" the notional profits for that year. But if this view is incorrect it is sufficient to point out that in the present case there is no evidence as to the way in which the taxpayer's private accounts were kept so that there can be no question of any binding election on his part to charge the interest paid to capital.

In the course of the argument I asked Mr. Hills what a trader must do in order that he may bring himself within the provisions of r. 19 or s. 36, out of what tangible assets must he pay the interest? Mr. Hills found himself unable to answer this question, nor do I think that upon the Crown's argument it is susceptible of any intelligible answer. In truth, in my judgment, which I express with all respect, the argument of the Crown and the finding of the Commissioners are based upon a confusion between the two sides of an account and the two senses in which the words "paid out of" may be used. A company which decides to "pay" its debenture interest "out of" its reserve account may obtain the actual cash required for the payment by means of a bank loan, in which case it is true to say that it "pays" the interest "out of" moneys borrowed for the purpose. But the words "pay" and "out of" are here used in two quite different senses. In the latter expression they refer to the asset used to make the payment, in the former to the item (which from the accountancy point of view is a liability) against which the payment is charged in the company's accounts. In order to give effect to the decision to "pay out of" the reserve account all that has to be done is to write down that account by the amount paid. The transaction would be reflected in the company's balance-sheet: (1.) by an entry of the amount of the loan on the liability side; (2.) by a reduction in the reserve account by a corresponding amount. There would be no increase on the asset side to represent the cash borrowed since that cash has been used to pay the interest.

These considerations are no doubt elementary but they are apt to be overlooked, and as I think, with all respect, that in the present case they have been overlooked by the Special Commissioners I have thought it desirable to refer to them. In my opinion, the only intelligible and consistent meaning which can be given to the words "paid out of profits or gains brought into charge to tax" is one which (subject to certain exceptions in special cases) makes them apply where the amount of interest paid does not exceed the figure of profits or gains as ascertained for income tax purposes for the year in question. Subject again to the same exceptions the actual source of the cash by means of which the interest is paid—a source which may be selected for quite irrelevant and fortuitous reasons—is immaterial.

What I have said above is I think entirely consistent with the decisions upon this topic. I do not propose to refer to them in detail. In *Central London Ry.* v. *Inland Revenue Commissioners* (1) Lord Hanworth M.R. sums them up and states the rule to be deduced from them as follows: "These

(1) 151 L. T. 333, 342.

C. A.
1936

FENTON'S TRUSTEE v. INLAND REVENUE COMMISSIONERS.

Greene L.J.

cases, to my mind, make it perfectly clear that, in the ordinary course where there is a mixed fund but where there is an abundance of funds brought into charge, the ordinary appropriation should be deemed to take place, namely, that the subject has paid the money which he has paid out of the available fund which has been already brought into charge and that he is entitled, therefore, to retain the sum which he has deducted from the sum paid over to the annuitant in his own hands; that would be what might be called the 'rule of the road.'" The exceptions to this rule are based upon easily intelligible principles. Lord Sumner in *Birmingham Corporation* v. *Inland Revenue Commissioners* (1) says this: "A series of decisions in your Lordships' House has laid down, not it is true in any case precisely the same as this, the conditions under which payments, neutrally made in fact, may be deemed to have been so made for income tax purposes and the effect of this assumption upon the disposal of the sums deducted from the payments of interest. I will spare your Lordships any citation of them, but they lay down a limitation on the right to do this, depending on its being lawful or legitimate to have made the payments out of such chargeable profits, if this had actually been done." If it is not lawful or legitimate to charge against the profits in respect of which the relevant account is drawn up for income tax purposes a particular item of expenditure upon interest clearly it cannot be said that the interest has been "paid out of profits or gains charged to tax." Another example of the same principle applied to different facts is to be found in the *Central London Ry.* case (2) already referred to. It is to be observed that all these special cases (with the possible exception of the *Central London Ry.* case (2)) are cases of corporations whose dealings with their money and their accounts were subject to special statutory provisions which had the effect of making it "not lawful or legitimate" to follow the ordinary rule. In the *Central London Ry.* case (3) the action of the company in charging interest to capital had the effect of setting free a fund for dividend purposes, and it was held that after this election had been made it would have been improper to charge the interest to revenue, a consideration which does not arise where the taxpayer is an individual. In my opinion, the principles upon which these exceptions are based have no application in the case of an individual. He can obtain the money required to pay his interest from any source he pleases. He is not bound to keep accounts. If he does so he can charge the payment to capital or revenue as he pleases and he can at any time write back to revenue account an item which he has charged to capital and vice versa.

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(1) [1930] A. C. 307, 314.

(2) 151 L. T. 333.

(3) 151 L. T. 333.

In conclusion I may point out that if the Crown's contention be right tax will be paid twice in respect of the same interest, once by the taxpayer and once by the bank, which will be bound to bring the interest received into account in arriving at its profits. It is, of course, the fact that in the case of short loans this double taxation may often take place. If the borrower has no profits or gains "out of" which the interest can be "paid" he is not entitled to recover any tax. Where, however, there are profits or gains of the borrower, if he is to be charged with tax on the full amount thereof without any right of recovery, double taxation takes place in a manifest and unjust form. Moreover, the Crown's argument also leads to double taxation in the case of annual interest. If, as the Crown contends, a debtor who pays annual interest out of borrowed moneys cannot claim to have paid it out of profits or gains brought into charge, the result, if both payer and recipient are assessable to surtax, will be that the recipient must include the interest in his return of total income for surtax purposes while the payer will not be entitled in his return to deduct it.

For these reasons, and upon the basis that the transactions with the bank with regard to the interest amounted to a payment of interest effected out of moneys borrowed from the bank for the purpose, I am of opinion that the sum in question in this case was up to the amount claimed "paid out of" profits or gains charged to tax notwithstanding that it was also, but in a different sense, " paid out of " moneys borrowed from the bank for the purpose.

LORD WRIGHT M.R. Then the appeal will be dismissed with costs.

Appeal dismissed.
Leave to appeal to House of Lords granted.

Solicitors for appellant: *Blundell, Baker & Co., for Mumfords & Gordons, Bradford.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

C. A.
1936
March 24, 25.

ALDERMAN *v.* GREAT WESTERN RAILWAY COMPANY.

Workmen's compensation—Accident " arising out of and in the course of the employment "—Travelling Ticket Collector—Necessity of staying in lodgings on one journey—Fall in street in proceeding from lodgings to station—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.

The applicant, who was a travelling ticket collector in the employment of the respondent railway company, had, in the course of his duty, to travel from Oxford, where his home was, to Swansea, where he had to stay overnight, returning thence on the following day to Oxford. Being also qualified as a guard and, as such, liable to be called upon in an emergency, he was required by the railway company to leave, and he in fact left with them, the address of his Swansea lodgings. Apart from this obligation he had an unfettered right as to how he spent his time at Swansea between signing off and signing on, and he could reach the station by any route or by any method he chose. In proceeding one morning from his lodgings to Swansea station to perform his usual duty, he fell in the street and sustained an injury in respect of which he claimed compensation:—

Held, that while in his lodgings at Swansea or in the street proceeding thence to the station, the applicant was not performing any duty under his contract of service; that, therefore, the accident did not arise in the course of his employment; and consequently that he was not entitled to compensation.

Philbin v. *Hayes* (1918) 11 B. W. C. C. 85 applied.

London & North Eastern Ry. Co. v. *Brentnall* [1933] A. C. 489 distinguished.

APPEAL from an award of the judge of Marylebone County Court.

The applicant, who was a ticket collector in the service of the Great Western Railway Company, resided at Oxford, and his duty, which he had been performing for some years, required him to travel from Oxford to Paddington and from Paddington to Swansea, where he had to stay overnight, and next morning to return to Oxford via Paddington. He had to leave the address of his Swansea lodgings with the company's officials so that they might know where to find him in case he was required for emergency duty, he being also qualified as a guard. On January 16, 1935, he made the usual journey to Swansea, and on the following morning in walking from his lodgings to the station in order to make the return journey to Oxford via Paddington he slipped in the street and broke his ankle, whereby he was incapacitated for a considerable time, and in respect of this he claimed compensation.

The county court judge stated in his findings that the applicant's "right under his contract of service was, after arrival at Swansea, to choose any lodgings in reasonable proximity to his work, to exercise an unfettered right in spending his time between signing off and signing on and to get to the scene of his work by any route or any method of locomotion he might choose to select. His obligations under the contract of service were to leave his address with his employers, not to go too far away, and to sign on at the company's premises (where his duties lay) at the scheduled hour"; that the accident in the street in going from his lodgings to the station at Swansea to resume work did not arise in the course of the applicant's employment; and therefore that he was not entitled to compensation.

The applicant appealed.

W. Shakespeare for the applicant. The question is, what was the applicant employed to do? He was employed to go to Swansea, to stay there overnight, and to go to the station on the following morning to resume his active duty as a ticket collector. He would not have been in Swansea were it not that his contract of employment required him to be there; he was there in the course of his employment, particularly as he was obliged to leave the address of his lodgings so that he could be called upon if an emergency arose. In *Davidson & Co.* v. *M'Robb* (1), Lord Finlay said that the phrase "in the course of the employment" meant "in the course of the work which the man is employed to do, and what is incident to it; in other words, in the course of his service." In *St. Helens Colliery Co.* v. *Hewitson* (2), Lord Buckmaster stated that the same phrase "is satisfied if the workman is in the place where the accident occurred by reason of an implied term of the contract of service." Both those definitions are satisfied in the present case. In *London & North Eastern Ry. Co.* v. *Brentnall* (3) the workman was injured while in a hostel which he was under a duty to use, and it was held that as it was in accordance with the terms of his contract of service that he was there, the accident arose out of and in the course of his employment. If in that case the House of Lords had said that it was an implied term of his contract that he should use the hostel, the result would have been precisely the same, and would have covered the present case.

Cave K.C. and *D. C. Bartley* for the respondents. The contention that the applicant, during the whole time he was in Swansea, was acting in the course of his employment merely because he might in an emergency be called upon by the respondents is untenable. In *London & North Eastern Ry. Co.* v. *Brentnall* (3) the place where the workman met with his accident was the very place where he was directed to go by the employers. [They were stopped.]

W. Shakespeare replied.

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(1) [1918] A. C. 304, 314; 10 B. W. C. C. 673, 683.

(2) [1924] A. C. 59, 67.

(3) [1933] A. C. 489.

SLESSER L.J. In this case the applicant met with an accident by slipping on the highway, thereby breaking his ankle. It is said on his behalf, that the accident arose out of and in the course of his employment, and no question is raised that the accident may have arisen out of the employment, but it is said by the respondents that the county court judge was right in coming to the conclusion that the applicant had failed to show that the accident arose in the course of the employment. The facts are really not in dispute though the inference to be drawn therefrom may be a matter of debate.

The applicant is a ticket collector who normally lives in Oxford, but his duties require him to go from Oxford to Paddington and from there to Swansea. At the latter place, his day's work finishes about 6.30 P.M. He stays in or near Swansea for the night and the next morning he returns from Swansea to Paddington and thence to Oxford. On the occasion in question, he duly proceeded from Oxford via Paddington to Swansea, and having arrived there he went to his lodgings. Next morning he started to go to the station at Swansea to take up his duties and slipped in the highway and sustained the injuries in respect of which he claimed compensation. Evidence was given both by the applicant and by another ticket collector as to the nature of their employment. From this it appears that both men are not only ticket collectors but are also guards, and that it is contemplated in their contract of employment that they may be required to do emergency work after they have done their ordinary work as ticket collectors. Were it not for the fact that by his contract the applicant was under an obligation to leave the address of his lodgings with the company and not to go too far away, this appeal would have been unarguable. If he had an unfettered choice at the end of his day's work as ticket collector to spend the night where he liked and how he liked, and that merely the next morning he had to return to his work, he would be in precisely the same position as any other man who, living at home, has to perform a journey, long or short, in order to reach the place of his work. Mr. Shakespeare, on behalf of the applicant, admits that in such a case where there is no obligation to use a particular route or a particular means of transit, a man's work normally begins at the place of his work, and the employer is not responsible for an accident occurring before that work is begun. It is said, however, in this case, that it is an implied term of the contract of service that the applicant was limited in his choice of nocturnal residence—that he must be in a place not too far away, so that he could be in reasonable proximity to the station and that he was bound, as a matter of duty, or at any rate as a term of his contract, to be in a certain place in order that, if required, he might be found, and that he was, in the language of Lord Wrenbury in *St. Helens Colliery Co.* v. *Hewitson* (1), "in performance of a duty under his contract of service . . . . in the place where the accident occurs." Such a condition of affairs may exist. It was found to exist in *London & North Eastern Ry. Co.* v. *Brentnall* (2), where the workman, in the language of Lord Buckmaster, "as part of his contract of service, was bound to go to this hostel—that is the clear conclusion of the learned county court judge—and he was bound to go to the hostel for a particular purpose—the purpose of obtaining rest; and indeed it was essential for the proper conduct of his work that he should have rest during the day, for he had to take the train back again at 7.40 at night from Sheffield to Woodford Halse. From the time he left Woodford Halse in the morning, certainly until the time when he returned at night, and for all I know for a longer period . . . . he was most certainly in the employment of the railway company, and, as part of the terms of his contract of service, on the spot where the accident occurred." Then Lord Buckmaster said this, and it is a little significant: "I find it very difficult indeed to distinguish between the case where a man is compelled to take a particular means of going to his work, and a case where a man is compelled to go to a particular place where he has to rest between the different spells of his work, and I cannot help thinking that, if authority were required, *Hewitson's* case (1) is abundant for the purpose."

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(1) [1924] A. C. 59.

(2) [1933] A. C. 489, 492.

The whole purport of the judgments in *Brentnall's* case (1) was that it was the duty of the man in order that he might be properly rested (unless he had a particular licence to do otherwise), to sleep in the particular hostel provided by the railway company. There the workman satisfied the requirements that under the terms of his contract he was in the place where the accident occurred. But with every respect to the county court judge in the present case I do not feel inclined to base my conclusion solely upon the fact that the applicant met with his injury on the highway. In *Brentnall's* case (1) the workman, as I have said, was under a duty to go to and spend the time in the hostel, and I think that the going to and returning from that approved place was the doing of something in the course of the employment. There is no reason for thinking that if the applicant in that case, while in the course of his duty, which extended from the time he left Woodford in the morning till he returned to it at night, had slipped in the street in Sheffield between the hostel and the railway station, it would have made no difference in the result. I think, however, that the county court judge put to himself the right test—although he also asked the question whether the man had any greater right than others in the highway—namely, was he at the time of the accident doing something which he was employed to do. The only obligation upon him, as found by the judge, was not to go too far away and to leave his address with the employers. On these facts it is not possible to say that while he was in these lodgings or was in the street leaving these lodgings, he was doing anything in the performance of a duty under his contract of service or was acting in the course of his employment. It was open to him to lodge where he liked and there is no evidence to show that there was even a duty upon him to make any provision so that he could be called after signing off, beyond leaving his address with the company. It is one thing to leave his address and another thing to be under a contractual obligation to be at that address when required, and I can find no evidence, beyond the fact that he had to leave his address with the company, that he had

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(1) [1933] A. C. 489.

C. A.
1936

ALDERMAN
v.
GREAT
WESTERN
RY. CO.

Slesser L.J.

to be at that address at any particular time. It may be that if he persistently absented himself from that address, other questions might arise, but it is a fallacy to say that there was any obligation upon him to be at the place where he had given the address. His colleague Hill said this in evidence: "After I book off I am free till I book on again, except for emergency . . . . We make our own arrangements—sleep where we like. Company make no arrangements—entitled to sleep anywhere. We have to leave our address." In other words, this man was merely in the lodgings at Swansea because it was necessary to stay the night at Swansea as a consequence of his employment. The case is not dissimilar from that of *Philbin* v. *Hayes*. (1) There the employer was doing constructional work in a village where there was no sleeping accommodation for the large number of men engaged on the work, and to provide the necessary accommodation the employer erected huts. The men could occupy the huts, but were under no obligation to do so. The hut in which one of the workmen was sleeping was blown down and he was injured. The county court judge held that the accident happened in the course of the man's employment, but his decision was reversed by the Court of Appeal, where it was pointed out that the man was not living in the hut under any term of his contract; he was given the choice, and was free to use the hut or not, as he chose. Swinfen Eady L.J. there said (2): "Counsel for the applicant urged that there was a difficulty in obtaining lodging in the village. That I quite accept, and, of course, the man could only obtain such lodging as was available, but if he could obtain accommodation elsewhere suitable to his means, he was perfectly free to avail himself of it. The employer had no right to make him live in the hut. In my opinion the unfortunate accident . . . . was not an accident that happened in the course of his employment." Neville J. agreed and said (3): "I think he was no more doing something within the scope of his employment while sleeping in this hut than he would be sleeping in a lodging." In the

(1) 11 B. W. C. C. 85.

(2) Ibid. 92.

(3) Ibid. 93.

present case the judge was right in his conclusion, and the appeal therefore fails.

C. A.
1936
ALDERMAN
v.
GREAT
WESTERN
RY. CO.

GREENE L.J. Mr. Shakespeare's criticism of the county court judge's decision was in substance this, that it failed to imply into the contract of service a term under which the applicant was working. The term which he says should have been implied was to this effect: "You, the employee, shall choose your resting place in a room sufficiently near to make it practicable for you to perform your duties." In my opinion it is quite impossible upon the facts to imply any such term. The fact that a man can only perform his contract if he is in a particular place at a particular time is no justification for saying that it is an implied term of the contract that he shall choose such a resting place as to make it possible for him to be in that place at that time. If an employee under his contract of service is bound to present himself at 10 o'clock a.m. at a particular place, he does not break his contract merely by being two hundred miles away at 9.30. All that he has done is that he has put himself in such a position that he cannot perform his contract. His breach of contract begins, and begins only, when at ten o'clock he fails to present himself. On the facts of this case, and quite apart from the further difficulty which I shall mention in a moment, I am unable to imply any such term in the contract either at the Swansea end or at the Oxford end of the journey. I cannot see any greater justification for implying such a term at the Swansea end than there would be for implying it at the Oxford end. According to the evidence the applicant had been doing this trip for some years and he had always stayed at the same lodgings at Swansea. Supposing a week before the accident, he had moved his home from Oxford to Swansea and had continued to make the same journey in precisely the same way, I know not on what ground it could be said that a similar accident happening at Oxford would have entitled him to compensation. The circumstance that his home happens to be in Oxford is not, in my opinion, any justification for implying into this contract such a term as that suggested. I do not mean to say that there may not be contracts where the implication of such a term may be justified; all I say is that on the terms of this contract there is no justification for implying it. But the matter does not rest there, because the implication which, be it observed, is affirmative in form appears to me to be inconsistent with the actual findings of the county court judge, who summarizes the contractual position in words which I will quote in order that my point may be made clear. He describes first, the rights of the workman; he then defines his obligations. The workman's "right," says the judge, "under his contract of service was after arrival at Swansea to choose any lodgings in reasonable proximity to his work, to exercise an unfettered right in spending his time between signing off and signing on, and to get to the scene of his work by any route or any method of locomotion he might choose to select. His obligations under the contract of service were to leave his address with his employers, not to go too far away, and to sign on at the company's premises (where his duties lay) at the scheduled hour." By the phrase "not to go too far away" I think the judge is referring to the choice of the lodgings; not to lodge too far away would appear to be what is meant. It will be observed that the obligation in respect of locality is negative in form, and is so found. Where there is in the contract of service a negative obligation during the period when the actual operations of work have ceased, and that obligation is not to go outside a certain area, it is quite illegitimate to say that it necessarily follows that all the time the man spends inside the area is spent in the course of his employment. There is a real distinction between the two things. If the man's contract is that he shall be in a particular place or in a particular area, I can well understand an argument that so long as he is there he is doing something which he has contracted to do. If on the other hand during a period of rest or holiday his obligation is not to go outside an area, it seems to me impossible to say that it necessarily follows from that that his action in remaining within that permitted area is something done in the course of his employment. Suppose a man is entitled under his contract of service to a fortnight's holiday a year, and it is a term of the contract that during his holiday he shall not leave the British Isles, it would be impossible to say that while, in pursuance of that obligation, he refrains from going outside the British Isles, the holidays are spent in the course of his employment. They are not. In staying in the British Isles he is not acting in the course of his employment; what he is doing is that he is not breaking his contract, which is quite a different matter. The distinction in other matters and other branches of the law may not be a very important one, but when it comes to this particular statute where it must be shown that the accident arises in the course of the employment, I think the distinction is a very real one. I am not prepared to extend the principles which have been laid down to cover the proposition that a man who, after his day's work is over, is put on terms not to go outside a certain area, is thereby entitled to say " while I am in that area during my hours of rest, I am acting in the course of my employment." Of course it would not follow from the argument, even if it were accepted, that every accident that happened to the man within the permitted area would be one entitling him to compensation because he would still have to prove that the accident arose out of his employment. But taking the essential fact which has to be proved that it was in the course of the employment, I find it impossible to say that on the facts found by the judge this accident arose in the course of the employment. I am unable therefore to draw the inference which Mr. Shakespeare invites us to draw. I agree therefore that the appeal must be dismissed.

SCOTT L.J. I agree. The essence of the county court judge's judgment—and I agree with the way in which he approached the question—was this :—he first considered when the employment, on which the applicant was employed when on active duty, terminated each day, and then considered whether in the interval between that moment and his coming back to active employment the next day his employment was in any real sense continuing. The county court judge came to the conclusion that it was not, and to my mind, that conclusion is right. He found that the applicant signed off on arrival at Swansea at a particular time and signed on again next morning at another particular time. Those two prepositions "off" and "on" really explain his finding. When it is said that the man signed off it is meant that he was free to occupy his time for his own purposes in any way he chose; his employment was not continuing and therefore he was free. If he was completely free there is an end of the matter, because it is plain that he was not then doing anything or being in any place in the course of his employment. It is said, however, that the applicant was obliged to leave an address where he could be found, if wanted in case of an emergency, and that therefore his employment was continuing. That argument is in my view fallacious. As I understand it, the contract of employment was this: "you shall do your active work under the orders of the company between the time you sign on and the time you sign off, and you will be completely free from that moment until the time comes to sign on again, subject only to this condition, that we reserve the right to call upon you to resume your employment on receiving notice from us in case of emergency; and you must undertake as a term of the contract that you will give your address to us to facilitate our giving notice to you in case of emergency." The mere obligation to keep the company supplied with an address does not justify the inference that the employment was continuing during the period off duty; it left the man wholly free to do what he liked with his own time, subject only to his freedom being terminated if the company required him to resume duty. Until such a notice was actually received by the man, it is not possible to say that his employment was continuing any more at an out station than at his home station where, it is conceded, he would not then be in the course of his employment, seeing that his employment would not begin until he reached the station for the purpose of signing on. For these reasons I agree that the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondents: *A. G. Hubbard.*

J. S. H.

HASELDINE v. WINSTANLEY.

1936
Feb. 6.

[1935. H. 3033.]

Bill of Exchange—Document with no addressee or drawee—Subsequent insertion and alteration—Acceptance obtained by fraud—Alteration with consent of drawer but without the knowledge of acceptor—Acceptor's name inserted as addressee without his knowledge—Material alteration—Validity of document as promissory note—Liability of acceptor to bona fide holder for value without notice—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 6, *sub-s.* 1; 20, *sub-s.* 1; 64, *sub-s.* 1.

M. drew two documents in the form of bills of exchange, but addressed to no one, for 1000*l.* and 500*l.*, respectively, payable ninety days after date. The defendant was induced, by fraud, to sign a form of acceptance written across each document. M. then took the documents to the plaintiff and requested him to get them discounted at his (the plaintiff's) bank. The plaintiff, by mistake, inserted M.'s name as addressee on both documents, and took them to his bank, who, however, ultimately declined to discount them. M. then asked the plaintiff to discount them for him. Before doing so, the plaintiff, in the presence of, and with the consent of M., crossed out M.'s name as addressee and substituted that of the defendant. The plaintiff, as bona fide holder for value without notice of any fraud, subsequently presented the documents to the defendant, who refused to pay:—

Held, that (1.) the insertion of the defendant's name as addressee was within s. 20 of the Bills of Exchange Act, 1882, and made the documents good bills of exchange on which the defendant could be sued; (2.) there was no material alteration within s. 64 of that Act; and (3.) if the documents were not good bills of exchange, they were promissory notes on which the defendant could be sued by a bona fide holder for value without notice.

ACTION tried by Horridge J. without a jury.

On July 1, 1935, one M. H. Morris, drew two documents in the form of bills of exchange, except that neither document had on it the name of an addressee or drawee. One of the documents was stamped with a 10s. stamp and read : " Ninety days after date pay to my order the sum of one thousand pounds sterling." The other document was stamped with a 5s. stamp and was for 500*l*. In every other respect it was similar in form to the first-mentioned document. Both documents were dated July 1, 1935, and were signed " M. H. Morris."

The defendant, Major Richard Winstanley, was induced, to sign the following form of acceptance written across each of the documents :

> " Accepted payable at National Provincial Bank Limited, Southampton, Richard Winstanley."

The learned judge found that the acceptances were obtained from the defendant Winstanley by fraud.

The two documents were delivered on July 2, 1935, by Morris to the plaintiff who, in the presence of Morris, wrote in the left-hand bottom corner of each document the name and address of M. H. Morris, as addressee. The plaintiff then took the two documents to his bankers with a request that they should discount them. This his bank ultimately declined to do. Morris then asked the plaintiff to discount them for him. The plaintiff agreed to do so, but, before the documents were discounted, the plaintiff in the presence of Morris, and with his consent, struck out Morris's name and address from the bottom left-hand corner of the documents and inserted the name and address of the defendant Winstanley as addressee in place of Morris. The plaintiff subsequently presented the documents to the defendant Winstanley, who refused to pay. The learned judge found that the plaintiff was a bona fide holder for value and that he took the documents without notice of any fraud.

The plaintiff brought an action claiming against the defendant Winstanley as acceptor and against the defendant Morris as drawer of two bills of exchange for 1000*l*. and 500*l*. respectively, both dated July 1, 1935, and both payable ninety days after date and indorsed by the defendant Morris to the plaintiff, of the dishonour of which on presentation the defendant Morris had notice. There was an alternative claim against the defendant Winstanley as maker of two promissory notes for 1000*l*. and 500*l*. respectively, both dated July 1, 1935, and both payable ninety days after date, which said notes were indorsed by the defendant Morris to the plaintiff and had not been paid.

The defendant Winstanley, by his defence, denied that he was indebted to the plaintiff and said that the documents referred to in the statement of claim were not bills of exchange or enforceable as such; that they purported to be directed to the defendant Morris, and to be payable to his order; that the plaintiff was not and never became the holder for value or in due course of either of the alleged bills of exchange, and that the documents were to the plaintiff's knowledge irregular on their face in that after the defendant Winstanley's acceptance had been obtained thereto by fraud each of the documents had in fact been altered in material particulars without the knowledge and in fraud of the defendant Winstanley by erasing the name of Morris as drawee and substituting that of the defendant Winstanley therefor. He further alleged that the plaintiff well knew that the defendant Morris was an undischarged bankrupt, and that he (the defendant Winstanley) had received no consideration whatever for his acceptance and that he would contend that the documents sued on were not enforceable as bills by the plaintiff.

The plaintiff, in his amended reply, joined issue and said that the defendant Morris delivered to him the bills of exchange or promissory notes on July 2, 1935, and that, on that day, while in possession of the bills or promissory notes, the plaintiff in the presence of the defendant Morris, by mistake, wrote in the left-hand bottom corner of each of the documents the name and address of the defendant Morris. On July 5, while in possession of the bills or promissory notes, the plaintiff discovered his mistake and he then, in the presence of the defendant Morris, struck out the name and address of Morris and wrote in place thereof the name and address of the defendant Winstanley. Thereafter, on July 5, 1935, the plaintiff in good faith gave value for them.

The plaintiff further said that the defendant Winstanley

1936

HASELDINE
v.
WINSTANLEY

signed the bills or promissory notes as acceptor and delivered them to the defendant Morris, who indorsed them to the plaintiff and the plaintiff in good faith gave value for them, and that the defendant Winstanley was estopped from denying the validity of the said bills or promissory notes or either of them.

N. L. C. Macaskie K.C. and *J. P. Eddy* for the plaintiff.

The plaintiff is a bona fide holder for value, without notice of any fraud. The documents are good bills of exchange, on which the defendant Major Winstanley is liable as acceptor. Even if they are not good bills of exchange, they are promissory notes, and Major Winstanley is liable on them as acceptor or maker. Bills of Exchange Act, 1882, s. 20; *Peto* v. *Reynolds* (1); *Mason* v. *Lack.* (2)

F. J. Tucker K.C. and *R. A. Willes* for the defendant Winstanley. This defendant is not liable. The documents on which the action is brought are not enforceable as bills of exchange, nor as promissory notes. Major Winstanley's signature as acceptor was obtained by the fraud of Morris, and each of the documents had been altered in material particulars without Major Winstanley's knowledge by erasing the name of Morris as drawee and substituting that of Major Winstanley. Under s. 64 of the Bills of Exchange Act, 1882, that alteration avoided the bills or acceptances, as against Major Winstanley, who neither made, authorized, nor assented to the alteration. A person who, without inquiry, takes from another an instrument signed in blank by a third party and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument: see *France* v. *Clark*, per Lord Selborne L.C. (3), citing the observations of Bramwell L. J. in *Hogarth* v. *Latham* (4); of Stuart V.-C. in *Hatch* v. *Searles* (5);

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(1) (1854) 9 Ex. 410; (1855) 11 Ex. 418.

(2) (1929) 140 L. T. 696; 45 Times L. R. 363.

(3) (1884) 26 Ch. D. 257, 262.

(4) (1878) 3 Q. B. D. 643, 647.

(5) (1854) 2 Sm. & Giff. 147, 152.

and of Turner L.J. in *Tayler* v. *Great Indian Peninsula Ry. Co.* (1) Where a party sues on an instrument which, on the face of it, appears to have been altered it is for him to show that the alteration has not been improperly made. *Henman* v. *Dickinson.* (2) See also *Davis* v. *Clarke.* (3)

HORRIDGE J. This action is brought to recover two sums of 1000*l.* and 500*l*, the amount of two separate documents. I use the word "documents" for the moment as a negative word. On July 1, 1935, one Morris obtained the signature in the form of an acceptance on those two documents from the defendant, Major Winstanley. At that time the documents were not addressed to any person. These documents were brought by Morris to Mr. Haseldine, the plaintiff, and the plaintiff filled them up with the name of Morris as the addressee in the documents. The documents were then taken by the plaintiff to his bank, with a request that they should discount them. The bank refused to discount them, not on the ground that the documents were informal in any way, but on the ground that they did not think the defendant was as well off as they had been told he was. The plaintiff's bank having refused to discount the documents, Morris asked the plaintiff to discount them for him, and before they were discounted, the plaintiff, with the consent of Morris, struck out the name of Morris as addressee of the documents and substituted that of Major Winstanley. It is quite clear to my mind that the documents as originally produced were not regular bills of exchange, because under s. 6, sub-s. 1, of the Bills of Exchange Act, 1882: "the drawee must be named or otherwise indicated in a bill with reasonable certainty." Therefore the documents were not at that time good bills of exchange, but it has not been disputed that the documents as then presented were good promissory notes, except for one thing, that it is said that they were not good promissory notes because they had on them Morris's name as addressee at that time.

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(1) (1859) 4 De G. & J. 559, 574.
(2) (1828) 5 Bing. 183.
(3) (1844) 6 Q. B. 16.

The first point I have to deal with is whether or not at the time they were sued on, these documents were good bills of exchange. I think they were. I think they are covered by s. 20 of the Bills of Exchange Act, 1882. That section says: "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit." In this case the person holding the documents at the moment was Morris, because he had not then had the alteration made. Mr. Haseldine, with his approval, made the alteration and put in the name of Major Winstanley as the addressee. In my view that made the documents good bills of exchange on which Major Winstanley could be sued.

But supposing I am wrong in that, and they were not good bills of exchange, they were in my view good promissory notes; and that seems to me to be decided by *Mason* v. *Lack*. (1) The judgment in that case is founded very largely on the earlier case of *Peto* v. *Reynolds*. (2) I think they were perfectly good promissory notes, and it is not disputed that they were good promissory notes, but it is said that they were altered in material particulars, and s. 64, sub-s. 1, is relied on. That sub-section provides: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration." It seems to me that in this case there was no material alteration. If the alteration made the documents good bills of exchange, then the first ground of my decision is right, but if that ground is wrong then the alteration made by putting the name of Major Winstanley as addressee in the documents did not affect them in any way as promissory notes. I think that the plaintiff is entitled to recover, either on the ground that he

(1) 140 L. T. 696; 45 Times L. R. 363. (2) 9 Ex. 410; 11 Ex. 418.

1936

HASELDINE
v.
WINSTANLEY

Horridge J.

was justified in altering the documents and converting them into good bills of exchange, or, on the ground that the documents are good promissory notes.

I find that Mr. Haseldine was a bona fide holder for value and took the documents without notice; and I also find that the acceptances were obtained from Major Richard Winstanley by fraud.

There must be judgment for the plaintiff against the defendant Winstanley for the amount of the two bills, together with interest. Apparently, the other defendant was not served.

Judgment for plaintiff.

Solicitors for the plaintiff: *Percy Haseldine & Co.*

Solicitors for the defendant: *Neish, Howell & Haldane.*

T. W. M.

Considered. LOESCHER *v.* DEAN
[1950] 1 Ch. 491

PLUNKETT AND ANOTHER *v.* BARCLAYS BANK, LIMITED.

1936
March 10, 11, 13.

[1935. P. No. 1994.]

Applied. *In re* A SOLICITOR
[1952] 1 Ch. 328

Attachment of debt—Garnishee order—Banker—Solicitor's accounts—Client account—Debt owing from banker to solicitor—Cheque dishonoured after service of garnishee order nisi—"Refer to drawer" written on cheque—Claim for libel—Solicitors Act, 1933 (23 & 24 *Geo.* 5, *c.* 24), *ss.* 1, 8—*Solicitors' Accounts Rules,* 1935, *dated June* 8, 1934 (*S. R. & O.,* 1934, *No.* 718/*L.* 18)—*R. S. C., Order* XLV., *r.* 2.

The Solicitors Act, 1933, s. 1, provided that the Council of the Law Society should make rules with regard to "the opening and keeping by solicitors of accounts at banks for clients' moneys." The Solicitors' Accounts Rules, 1935, were made under that Act by the Council of the Law Society. Rules 1 and 2 provided for the keeping of "a client account" by every solicitor.

In compliance with the above-mentioned Act and Rules, the plaintiff, a solicitor, opened a client account at a branch of the defendants' bank. Money received from a client, to be applied in payment of rent and costs payable by the client to a third party, was paid into that account, and a cheque was duly drawn by the plaintiff on that account, and sent to the solicitor acting

1936

PLUNKETT
v.
BARCLAYS
BANK, LD.

for the third party. Before that cheque was presented a garnishee order nisi was served on the bank in respect of debts owing or accruing due from the bank to the plaintiff. When the cheque was presented the bank marked it "Refer to drawer," and returned it unpaid:—

Held, that money standing to the credit of the client account was a debt owing from the bank to the plaintiff, in whose name the account was opened, and the garnishee order nisi bound that debt in the hands of the bank. The bank was, therefore, justified in returning the cheque unpaid.

In the circumstances, the words "Refer to drawer" marked on the cheque were not libellous.

Dicta of Scrutton J. in *Flach* v. *London & South Western Bank, Ld.* (1915) 31 Times L. R. 334, 336, adopted.

ACTION tried by du Parcq J. without a jury.

In 1935, the plaintiff Donald William Plunkett, a solicitor, began to practise under the style of William Mandeville & Co. On August 23, 1935, two accounts were opened in his name at the Kingsway branch of the defendants' bank. The first was headed "Donald William Plunkett, trading as William Mandeville and Co." The second had the same heading with the addition of the words "Client Account." The client account was opened in compliance with the Solicitors Act, 1933, and the Solicitors' Accounts Rules, 1935, made thereunder by the Council of the Law Society. These rules were dated June 8, 1934, and came into force on January 1, 1935. (1)

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(1) The Solicitors Act, 1933 (23 & 24 Geo. 5, c. 24), s. 1, provided that the Council of the Law Society should make rules "as to the opening and keeping by solicitors of accounts at banks for clients' moneys."

Sect. 8: "(1.) Subject to the provisions of this section no bank shall, in connection with any transaction on any account of any solicitor kept with it or with any other bank (other than an account kept by a solicitor as trustee for a specified beneficiary) incur any liability or be under any obligation to make any enquiry or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it: Provided that nothing in this sub-section shall relieve a bank from any liability or obligation under which it would be apart from this Act."

Sub-s. 2: "Notwithstanding anything in the preceding sub-section, a bank at which a solicitor keeps an account for clients' moneys shall not, in respect of any liability of the solicitor to the bank, not being a liability in connection with that account, have or

1936

PLUNKETT
v.
BARCLAYS
BANK, LD.

The plaintiff Jasper John Jocelyn Addis, who was also a solicitor, was engaged by Mr. Plunkett as a managing clerk. The bank was instructed that all cheques drawn on the two accounts were to be signed by Mr. Plunkett and also by Mr. Addis, the latter signing as cashier. The learned judge held that the plaintiff Addis had no cause of action against the defendants, and hereafter in this report Mr. Plunkett is referred to as "the plaintiff."

When the client account was opened on August 23, 1935, nothing was paid into it, but on September 7, 1935, there was paid into the client account 48*l.* 5*s.* in cash. That money had been received from a client to be applied in payment of rent and solicitor's costs payable by the client to a third party. On September 6 a cheque for 48*l.* 5*s.* was duly drawn by the plaintiff on the client account. That cheque was sent to Mr. Nicholls, the solicitor acting for the third party to whom the rent was payable, and was acknowledged by him on September 9.

On September 9, 1935, an ex parte application was made in the Probate, Divorce and Admiralty Division for the service of a garnishee order nisi on the defendants in respect of debts owing or accruing due from the defendants to the

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obtain any recourse or right, whether by way of set off, counterclaim, charge, or otherwise, against moneys standing to the credit of that account: Provided that nothing in this sub-section shall deprive a bank of any right existing at the time when the first rules made under this Act come into operation."

The Solicitors' Accounts Rules, 1935, rr. 1 and 2, provide for the keeping of "a client account" by every solicitor.

Rule 3 provides: "No money shall be paid into a client account other than: (*a*) money held or received on account of a client: (*b*) such money belonging to the solicitor as may be necessary for the purpose of opening or maintaining the account: (*c*) money for replacement of any sum which may by mistake or accident have been drawn from the account in contravention of r. 4 of these rules: (*d*) a cheque or draft received by the solicitor representing in part money belonging to the client and in part money due to the solicitor, when such cheque or draft has not been split as provided by r. 2 hereof."

By the Rules of the Supreme Court, Order XLV., r. 2: "Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or Judge shall direct, shall bind such debts in his hands."

plaintiff. The application was made at the instance of Carmen Plunkett, the plaintiff's former wife, who had obtained a divorce from him. The plaintiff, as respondent in the divorce proceedings, was still indebted to the petitioner in the sum of 150*l.* 17*s.* 9*d.* for costs. A garnishee order nisi was made and was served on the defendants. It was in the usual form and ordered " that all debts owing or accruing due from the . . . . garnishees to the above-named respondent " [the plaintiff in this action] " (not exceeding the sum of 150*l.* 17*s.* 9*d.*) be attached to satisfy the amount due from the said respondent to the petitioner under an order dated July 15, 1935, for the sum of 150*l.* 17*s.* 9*d.* costs (together with the costs of the garnishee proceedings), on which order the said sum of 150*l.* 17*s.* 9*d.* remains due and unpaid."

That order was served on the defendants on September 9, and on September 10 the plaintiff was informed by the chief assistant at the Kingsway branch, the manager being away, that he had consulted the head office, and that in the view of the bank the garnishee order would apply to both accounts, so that no cheque drawn on the " Client Account " would be honoured while the order remained in force. Vigorous protests were made by Mr. Addis, the plaintiff's managing clerk, on the plaintiff's behalf. It was not in dispute that Mr. Addis, on September 10, 1935, offered proof that the money in the client account was in fact the money of a client. The defendants, however, maintained their attitude.

The garnishee order nisi was made absolute by the Registrar on September 23, 1935, and an appeal against the Registrar's decision was dismissed by Langton J., who affirmed the order on October 8, 1935.

Mr. Nicholls presented the cheque for 48*l.* 5*s.* for payment after the defendants had been served with the garnishee order nisi. His signature as indorser of the cheque was not easily legible, and the defendants at first marked the cheque " Indorsement requires confirmation." On September 11 it was re-presented, and thereupon the defendants marked it: " Refer to drawer," and returned it unpaid. Before the dishonoured cheque reached Mr. Nicholls, Mr. Addis, the plaintiff's managing clerk, on the plaintiff's behalf, had paid Mr. Nicholls the 48*l.* 5*s.*, and the solicitors for the judgment creditor, on being informed of the facts, wrote to the defendants expressing their willingness that the garnishee order nisi should not be in operation so far as the client account was concerned.

An action was then brought by the plaintiff claiming damages from the defendants for alleged breach of contract by the dishonour of the cheque and for alleged libel in writing the words " Refer to drawer " on the cheque.

The defendants pleaded (inter alia) that the money standing to the credit of the client account was due from the defendants to the plaintiff, and that service of the garnishee order nisi precluded them from paying that debt to the plaintiff. In the circumstances they said that the only course open to them was to mark the cheque drawn on that account " Refer to drawer."

Hemmerde K.C. and *Neil Lawson* for the plaintiffs. The defendants acted negligently and in breach of their contract with the plaintiffs. The client account was opened to comply with the Solicitors Act, 1933, and the Solicitors' Accounts Rules, 1935. The money standing to the credit of that account is held in trust on behalf of the persons who are beneficially entitled to it. That money belongs to the clients, and is not liable to attachment under a garnishee order made in respect of debts owing or accruing due to the solicitor, otherwise the whole object of the Act of 1933 and the Solicitors' Accounts Rules, 1935, which was to protect moneys of clients, would be destroyed.

[*Roberts* v. *Death* (1) and *Hancock* v. *Smith* (2) were referred to.]

W. N. Stable K.C. and *George Bankes* for the defendants. The money standing to the credit of the client account is a debt due from the bank to the solicitor. After the service of the garnishee order nisi, the bank was not only entitled to refuse to honour cheques drawn on the client account, but

(1) (1881) 8 Q. B. D. 319.
(2) (1889) 41 Ch. D. 456.

1936

PLUNKETT v. BARCLAYS BANK, LD.

was bound to refuse to pay such cheques. It would have been wrong for the bank, after having been served with the garnishee order nisi, to pay the money to the plaintiff or to his order. After that order was served on the bank, the judgment creditor had an equitable charge on the amount due to the plaintiff from the bank. Under Order XLV., r. 2, service of the garnishee order nisi on the bank bound the money standing to the credit of the client account in the bank's hands, as being a debt due from the bank to the solicitor. If the bank paid the cheque in question it would be in peril of having to pay the amount over again to the judgment creditor. It was not for the bank to adjudicate on conflicting claims to money in its hands. The service of the garnishee order nisi is a complete answer to the action. See *Rogers* v. *Whiteley* (1); *Galbraith* v. *Grimshaw and Baxter* (2); *Asch Kenasy* v. *Midland Bank, Ld.* (3); *Gray* v. *Johnston*, per Lord Westbury (4); *Swiss Bank Corporation* v. *Boehmische Industrial Bank.* (5) On the question whether the words "refer to drawer" constitute a libel, see per Scrutton J. in *Flach* v. *London & South Western Bank, Ld.* (6)

Cur. adv. vult.

March 13. DU PARCQ J. read the following judgment: The plaintiffs in this action claimed damages against the defendants for wrongfully dishonouring two cheques, and for libel. The plaintiff Donald William Plunkett is a practising solicitor. In the summer of 1935 he began to practise under the style of William Mandeville & Co. On August 23, 1935, two accounts were opened in his name at the Kingsway branch of the defendants' bank. The first was headed "Donald William Plunkett trading as William Mandeville & Co."; the second bore the same heading, with the addition of the words "Client Account." The second account was opened in compliance with the Solicitors Act, 1933, and the Solicitors'

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(1) [1892] A. C. 118.

(2) [1910] 1 K. B. 339.

(3) (1934) 50 Times L. R. 209; 51 Times L. R. 34.

(4) (1868) L. R. 3 H. L. 1, 14.

(5) [1923] 1 K. B. 673.

(6) 31 Times L. R. 334, 336.

Accounts Rules, 1935, made thereunder by the Council of the Law Society (S. R. & O., 1934, No. 718).

The plaintiff Addis, who is also a solicitor, was engaged by Mr. Plunkett as a managing clerk. The bank was instructed, for reasons into which I need not enter, that all cheques drawn on the two accounts were to be signed by Mr. Plunkett and also by Mr. Addis, the latter signing as cashier. The evidence of Mr. Rainer, the manager of the Kingsway branch, which I accept, and indeed the evidence of Mr. Plunkett made it plain that neither of the accounts was opened as a joint account, and that Mr. Addis was not a creditor of the bank in respect of either of them. At the beginning of his final address Mr. Hemmerde, on behalf of the plaintiffs, frankly abandoned the contention that Mr. Addis was entitled to maintain this action. Mr. Hemmerde further invited an intimation from me that I was satisfied by the evidence that neither account was a joint account, and having received that intimation did not address any further argument to me on the first account. Moreover, Mr. Hemmerde agreed that so far as the first account was concerned there was no answer to the defendants' plea of estoppel based on the order made by Langton J. dated October 8, 1935, affirming the garnishee order. It appears to me to be unnecessary therefore to review the evidence or to give any further reasons for my finding of fact upon that part of the case. So far as the cheque drawn on the first account is concerned the claim fails, and the plaintiff Addis has no cause of action against the defendants.

It remains for me to deal with Mr. Plunkett's claim in relation to the client account. Hereafter in this judgment I shall refer to Mr. Plunkett as "the plaintiff."

The account was opened on August 23, 1935, though nothing was then paid into it. On September 7 the plaintiff paid into the account the sum of 48*l*. 5*s*. in cash. This money had been received from a client to be applied in payment of rent and solicitor's costs, payable by the client to a third party. On September 6 a cheque for 48*l*. 5*s*. was duly drawn by the plaintiff on the client account; it was sent on that day with a covering letter to Mr. Nicholls, the solicitor acting for the person to whom the rent was payable, and was acknowledged by Mr. Nicholls on September 9.

On September 9 an ex parte application was made in the Probate, Divorce and Admiralty Division for the service of a garnishee order nisi on the defendants in respect of debts owing or accruing due from the defendants to the plaintiff. The application was made at the instance of Carmen Plunkett, formerly the plaintiff's wife, who obtained a decree nisi for dissolution of the marriage against the plaintiff in October, 1934, which decree was made absolute in July, 1935. The plaintiff, as respondent in the proceedings for divorce, was still indebted to the petitioner in the sum of 150*l.* 17*s.* 9*d.* for costs. A garnishee order nisi was made on the petitioner's application and was served on the defendants. It was in the usual form, and ordered "that all debts owing or accruing due from the garnishees to the respondent" (the plaintiff in this action) "not exceeding the sum of 150*l.* 17*s.* 9*d.* be attached to satisfy the amount due from the respondent to the petitioner, ... and further that the garnishees should attend before one of the registrars on September 23, 1935, on an application that they should pay the debt due from them."

This order was served on the defendants on the day on which it was made, and the manager of their Cheapside branch, where the plaintiff had a small account, at once wrote and informed the plaintiff of it. The manager of the Kingsway branch was not in London, but his chief assistant, Mr. Jackson, spoke to the plaintiff on the telephone on September 10, and told him, as was the fact, that he had consulted the head office of the bank, and that in the view of the bank the garnishee order would apply to both accounts at the Kingsway branch, so that no cheque drawn on the client account would be honoured while the garnishee order remained in force. Mr. Addis replaced the plaintiff at the telephone, and vigorously protested against this course being taken by the defendants, and later he renewed his protest to Mr. Tonkyn, an inspector at the head office. The defendants, however, maintained their attitude. Mr. Nicholls presented the cheque for

48*l.* 5*s.* for payment after the defendants had been served with the garnishee order. His signature as indorser was not easily legible, and the defendants at first temporized by marking the cheque "Indorsement requires confirmation." On September 11 it was re-presented, and thereupon the defendants marked it "Refer to drawer," and returned it unpaid.

It is satisfactory to know that before the dishonoured cheque reached Mr. Nicholls, Mr. Addis, acting on the plaintiff's behalf, had paid him the sum of 48*l.* 5*s.*, and that the solicitors acting for the judgment creditor, on being informed of the facts, wrote a letter to the defendants dated September 13, expressing their willingness that the garnishee order nisi should not be operative so far as the client account was concerned.

The plaintiff complains that the defendants acted negligently and in breach of their contract with the plaintiff when they dishonoured the cheque, and that the words "Refer to drawer" were defamatory of him. The defence, put shortly, is that the moneys standing to the credit of the client account were due from the defendants to the plaintiff, and that service of the garnishee order nisi precluded them from paying that debt to the plaintiff. In the circumstances, they say that the only course reasonably open to them was to mark the cheque "Refer to drawer."

The question at issue is clearly of importance not only to banks but to solicitors and their clients. It is well known that it has long been the practice of many, and I suppose of most, solicitors to pay moneys which they receive on behalf of their clients into a separate banking account or separate accounts, so that their own and their clients' moneys may be kept apart. The Solicitors Act, 1933, s. 1, empowered the Council of the Law Society to make rules "as to the opening and keeping by solicitors of accounts at banks for clients' moneys." The rules to which I have already referred were made in 1934, and came into operation on January 1, 1935. [His Lordship read s. 8 of the Solicitors Act, 1933, and rr. 1, 2, and 3 of the Solicitors' Accounts Rules.] I have found it necessary to consider carefully what effect s. 8

of the Act may have on the rights and liabilities of the parties to this action. Sect. 8 clearly includes client accounts kept by solicitors within its ambit, and enacts that no bank shall in connection with such accounts be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it. This seems to me to be another way of saying that the bank in the circumstances mentioned shall not be deemed to have any knowledge which it has not in fact as to such rights. Nobody can be deemed to have knowledge of rights of third persons to money in a customer's account when the customer is absolutely entitled to all the money in it. Equally, I think the bank is relieved by the section from any obligation to make inquiry as to the rights of third persons in respect of a client account. All this, however, is subject to the proviso, which is, of course, important. The bank is not relieved by the Act from any obligation under which it would be apart from the Act. Further, it is to be observed that the section does not say that the bank is to be deemed to be ignorant of facts which are within its knowledge or that it is to be deemed to be ignorant of the law.

In my judgment, the defendants were in the same position, for the purposes of this case, in which they would have been before the passing of the Solicitors Act of 1933 and the coming into operation of the Statutory Rules if the client account had been kept voluntarily by a solicitor who, to their knowledge, guided himself by self-imposed rules having the same effect as those which are now statutory. I cannot doubt, and indeed I think I am bound to assume, that the officials at the defendants' head office were acquainted with the provisions of an Act which so nearly affected the bank's interests and with the rules made thereunder.

If the defendants had that knowledge in fact, it needed no inquiry on their part to satisfy them that the money in the account was not within (*b*), (*c*) or (*d*) of rule 3. The defendants had not required the payment of any sum for the purpose of opening the account and nothing had been drawn from the account. The sum of 48*l.* 5*s.*, which was the only money paid into the account, had been paid into the bank in the shape of notes and coin. It followed that unless the plaintiff had broken the law, which ought not to be assumed, the sum of 48*l.* 5*s.* was " money held or received on account of a client " within (*a*). It was accordingly trust money, as is the money recovered by a judgment creditor in an action which he brings as trustee for another person (see *Roberts* v. *Death* (1)), or the money paid by a stockbroker into an account into which he pays nothing but moneys received on behalf of clients: see *Hancock* v. *Smith.* (2)

I must therefore deal with this case on the footing that the defendants knew that the sum of 48*l.* 5*s.* consisted of trust money, though they did not know, and were under no obligation to inquire, what person or persons had an equitable claim to it. It is not in dispute that in the course of his telephone conversation with the inspector at the bank's head office on September 10 Mr. Addis offered to produce proof that the moneys standing to the credit of the " client account " were in fact the moneys of a client.

The law and rules of practice relating to the attachment of debts are contained in Order XLV. of the Rules of the Supreme Court. Rule 1 provides for the making of an order nisi such as was made in this case. Rule 2 of Order XLV. is as follows: " Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct, shall bind such debts in his hands." If money standing to the credit of the client account was in fact a debt owing from the defendants to the plaintiff it cannot be doubted that the defendants were entitled to refuse to pay that money to the plaintiff or to his order after the service of a garnishee order nisi. It would in fact have been wrong to pay it to the plaintiff: see *Rogers* v. *Whiteley*, especially per Lord Halsbury (3), and *Galbraith* v.

(1) 8 Q. B. D. 319.

(2) 41 Ch. D. 456.

(3) [1892] A. C. 118, 121.

Grimshaw and Baxter, per Farwell L.J. (1) Service of the order nisi, and I now quote Farwell L.J., "does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt to any one but the garnishor without incurring the risk of having to pay it over again to the creditor." Order XLV., r. 5, provides, though imperfectly, for a case in which the debt sought to be attached belongs to some third person, or some third person has a lien or charge on it. I say "imperfectly" because the rule deals only with cases in which the garnishee suggests that a third person is beneficially interested. It was held, however, in *Roberts* v. *Death* (2), that the Court ought not to make the order absolute if it was shown that there was reasonable ground for thinking that the money due to the execution creditor was trust money even though the suggestion did not come from the garnishee.

The importance of Order XLV., r. 5, for the present purpose is that it contemplates a case where, as here, the garnishee knows that his creditor (the judgment debtor) is a trustee, and that the debt "belongs" to the cestui que trust. In such a case there is no doubt that the garnishee is under a duty to inform the Court of the claim of the person beneficially entitled to the money: see *The Leader*. (3) But unless the words of Order XLV., r. 1, clearly showed that the garnishee was to treat money due by him to a person as trustee for another as money due not to the trustee but to the cestui que trust, I should infer from the language of Order XLV., r. 5, that the garnishee was not entitled to pay the debt either to the cestui que trust or to the trustee for the benefit of the cestui que trust after notice of service of the order nisi.

The material words of Order XLV., r. 1, are: "All debts owing or accruing from such third person . . . . to such debtor." I find it impossible to say that money paid into a client account kept with a bank in the name of a solicitor is not a debt owing from the banker to the solicitor. It cannot be denied that the relation of debtor and creditor subsists between the bank and the solicitor. The solicitor may at any time draw a cheque upon the account and the bank must honour it. As a general rule, the bank is not entitled to set up a supposed jus tertii against the customer: see per Lord Westbury, *Gray* v. *Johnston*. (1) The service of the order nisi gives the judgment creditor, in the words of Farwell L.J. in *Galbraith* v. *Grimshaw and Baxter* (2), an equitable charge on the debt, and I cannot think that it was ever intended that the garnishee should be compelled to adjudicate upon conflicting equities, even though the problem presented by the conflict might appear to the lawyer to be a simple one.

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(1) [1910] 1 K. B. 339, 343.

(2) 8 Q. B. D. 319.

(3) (1868) L. R. 2 A. & E. 314.

For these reasons I am of opinion that the defendants were right in thinking that the money due from them on the client account was a debt due to the plaintiff, and that the garnishee order nisi bound that debt in their hands.

It was said that if this view were right the consequences would sometimes be serious. Some time must elapse before the making of the garnishee order nisi and the hearing of the application for the payment of the debt to the judgment creditor. It might well happen in the case of a solicitor who was a judgment debtor that he was not in a position to find the money necessary to satisfy the claim of a client out of his own pocket. These considerations are not strictly relevant to the question of law which I have had to decide. I think it right to say, however, that apart from the duty of the garnishee to inform the Court of the nature of the account, it is the manifest duty of a bank, as the defendants in this case recognized, to inform the customer at once of the service of the order and of the fact that cheques on the account cannot be honoured. Further, I think it will be well that judgment creditors applying for garnishee orders nisi should realize that they may incur costs unnecessarily if the order is so drawn as to affect a client account. It is always open to the creditor to ask the Court to restrict the terms of a garnishee order nisi so that such an account will not be affected by it. I have no right to lay down any rule in the matter, and I do not seek to do so; but the Court may sometimes think

(1) L. R. 3 H. L. 1, 14. (2) [1910] 1 K. B. 339, 343.

it proper in future to call the attention of the judgment creditor to this aspect of the matter when an order is sought against a practising solicitor. There is no reason why the common form of the order should not be modified in a proper case.

I have only to add that in the circumstances of this case the words " Refer to drawer " were, in my opinion, no libel. I respectfully adopt the language of Scrutton J., as he then was, in *Flach* v. *The London & South Western Bank, Ld.* (1) There the learned judge said that the words " Refer to drawer " in his opinion, in their ordinary meaning, amounted to a statement by the bank, " we are not paying ; go back to the drawer and ask why," or else, " go back to the drawer and ask him to pay." In the view he took of the case the bank were justified in not paying, and he did not think that it was possible to extract a libellous meaning from what had been said by the bank.

It is unnecessary for me to decide or express any opinion upon the further points taken by Mr. Stable, first that in any event the plaintiff would be entitled to nominal damages only for the dishonouring of the cheque ; secondly, that the alleged libel was published on a privileged occasion. It is perhaps proper to add, however, that there was admittedly no evidence of malice on the part of the defendants.

The defendants are entitled to judgment.

Judgment for the defendants.

Solicitors for the plaintiffs : *William Mandeville & Co.*
Solicitors for the defendants : *Powell, Burt & Lamaison.*

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(1) 31 Times L. R. 334, 336.

T. W. M.

BOAG *v.* STANDARD MARINE INSURANCE COMPANY, LIMITED.

1936
March 16, 17, 31.

Insurance (Marine)—Insurance of cargo for full value at date of policy—Increase in value of cargo—Increased value policy effected without knowledge of original Insurers—Total loss—Both policies paid in full—Letters of subrogation to both insurers—Salvage—Claim by increased value underwriters to contribution—Original insurers held entitled to whole amount.

The owners of a cargo of wheat insured it with the S. M. Company for 685*l.*, which was then its full value. During the voyage the price of wheat rose substantially, and the owners, without the knowledge of the S. M. Company, effected an increased value policy with underwriters for 215*l.* The cargo subsequently became a total loss, its net sound arrived value being 900*l.* Both the company and the underwriters paid the amounts of their respective policies in full, and received letters of subrogation from the cargo owners. Subsequently, as the result of general average adjustments, the owners received a sum of 532*l.* 4*s.* 8*d.* as salvage. The S. M. Company claimed the whole of this sum; the underwriters claimed to be entitled to contribution in the proportion which their policy bore to the total value. An interpleader issue was tried by Branson J. to determine the respective rights of the company and the underwriters:—

Held, that the underwriters were not entitled to contribution, but that the company were entitled to receive the whole of the salvage.

INTERPLEADER ISSUE tried by Branson J. in the Commercial List.

This issue came before the Court on the following agreed statement of facts:—

The Pentirion Steamship Company, Ld., the shipowners, were at all material times the owners of the steamship *Penthames*. Messrs. Bodey, Jerrim & Denning, Ld., the cargo owners, were at all material times the owners of a consignment of Italian wheaten sharps consisting of 1000 bags weighing 50 tons and 1325 bags weighing 99 tons 2 cwt. 1 qr. 4 lbs., having purchased them from Messrs. Matthews & Ventura, Ld. This consignment formed part of the general cargo of the *Penthames* from Mediterranean ports to the United Kingdom and was shipped at Naples on September 17, 1934, for delivery at Bristol. The c.i.f. invoice value of the consignment was 635*l.* 18*s.* 1*d.*, but, owing to an appreciable advance in the price of that commodity, the gross value at the intended port of discharge was 1043*l.* 16*s.*, and, after deduction of duty, landing charges, dues, discount and brokerage, it had a nett value of 899*l.* 14*s.* 8*d.*

The cargo owners had taken over the policies on their consignment which had been effected by Matthews & Ventura, Ld., with the claimants, Standard Marine Insurance Company, Ld. (hereinafter called "the company"), the cargo underwriters, on a total valuation of 685*l.*, and the cargo policies were dated September 19, 1934.

The cargo owners also insured the consignment with certain underwriters at Lloyds, of whom the plaintiff, Boag, was a representative (hereinafter called "the underwriters"), for 215*l.* on increased value of cargo by declarations made on September 28, 1934, against a floating increased value policy for 5000*l.* which was dated September 5, 1934.

After leaving Naples, the *Penthames* loaded at Carrara on September 19, at Genoa on the 20th, at Marseilles on the 21st and 22nd, and at Denia on the 24th and 26th. Subsequently, while the vessel was on the way to Alicante for further cargo she went aground off Cape Huertas on September 27.

In order that the vessel might be refloated some of her cargo was discharged into lighters, and some further cargo, including the cargo owners' consignment, was jettisoned and lost. The vessel was refloated, and berthed at Alicante on October 3, 1934.

On October 9, 1934, the cargo owners made a claim on the company under their policies for a total loss. That claim was taken down by the company and paid on November 5, 1934. On November 3 the cargo owners signed and handed to the company a letter of subrogation.

As a further consequence of the mishap to the *Penthames*, the cargo owners made a claim on the underwriters under the increased value policy for a total loss. That claim was taken down by the underwriters on October 26, 1934, and paid on December 11. The cargo owners then handed to the underwriters a letter of subrogation dated December, 1934.

In due course a general average adjustment, dated June 29, 1935, was prepared. In the adjustment the consignment of wheaten sharps ranked for allowance in the sum of 900*l.*, which was its nett sound arrived value, and after deducting the general average contribution of the cargo the balance to be received by the cargo owners amounted to 532*l.* 4*s.* 8*d.* It was not disputed that that balance was correctly arrived at by the adjusters, and that sum of money was in the hands of the shipowners and the adjusters as trustees.

The company claimed to be entitled to the whole of the 532*l.* 4*s.* 8*d.* under their subrogation rights, but the underwriters claimed to be entitled to 127*l.* 2*s.* 11*d.* of that sum as representing the proportion of the general average allowance applicable to the increased value policy. They also claimed under their rights of subrogation. The company had no knowledge of the existence of the increased value policy until after they had paid for a total loss.

C. T. Miller for the underwriters. There seems to be no authority on this point, but in fairness both sets of insurers ought to share in the salvage. There is no reason in principle why there should not be contribution between them.

[He referred to ss. 32, 79 and 80 of the Marine Insurance Act, 1906, and to the following cases: *North of England Iron Steamship Insurance Association* v. *Armstrong* (1); *The Commonwealth* (2); *Thames & Mersey Marine Insurance Co.* v. *British & Chilian Steamship Co.* (3)]

Contribution between insurers depends on equity, not on contract: *American Surety Co.* v. *Wrightson.* (4) They must contribute, and similarly are entitled to share in salvage in proportion to the risks which they have undertaken: *S.S. Balmoral Co. Ld.* v. *Marten.* (5)

As to the effect of subrogation, when the cargo owners here took payment from the company and gave them a letter of subrogation, they did not and could not thereby pass all their rights to receive salvage without regard to the rights of the underwriters. They passed only such rights as they had in view of the rights of the underwriters to subrogation.

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(1) (1870) L. R. 5 Q. B. 244.
(2) [1907] P. 216.
(3) [1915] 2 K. B. 214.
(4) (1910) 16 Com. Cas. 37, 39, 49, 54.
(5) [1902] A. C. 511, 519.

The right of subrogation is founded in equity and belongs to all insurers: *John Edwards & Co.* v. *Motor Union Insurance Co.* (1) [He also referred to Arnould on Marine Insurance, 11th ed. vol. II. § 1240, p. 1594.] Suppose that the assured made his claim against both sets of insurers and both of them paid him at the same moment, unless there were a right of subrogation between the insurers each set would be entitled to the whole and neither would be entitled to anything, which is manifestly absurd. Subrogation is a right which arises by law, and does not depend on the letter of subrogation given by the assured.

W. L. McNair for the company. The policy contains no provision for any subsequent policy on increased value. It contemplates that if the company pays a total loss, they will be entitled to the whole of the salvage. On November 5, 1934, they did pay a total loss, without knowing of the existence of any other policy, and in the belief that they were entitled to receive the whole of the salvage. The case might be decided on the principle of assignment. The letters of subrogation were equitable assignments. Equitable assignees take in order of date, where there has been no notice of the rights of other parties.

The letters of subrogation given by the assured to the company assigned the whole of the assured's rights, and as it was prior in time to the letter given to the underwriters, it gave the company the right to the whole of the salvage: Leake on Contracts, 8th ed., p. 912.

If the company's policy had stood alone, the company would have been entitled to the whole of the salvage, although it was based on a higher value, and a second policy with a higher valuation does not destroy the value in the first policy. An assured cannot by a subsequent policy cut down the right to subrogation which already exists under a previous policy: Phillips on Insurance, §§ 1714–1715.

(1) [1922] 2 K. B. 249, 254.

At the time when the company paid there were no rights of subrogation in the underwriters at all, for a right to subrogation did not arise until the underwriters paid the assured, and here the underwriters did not pay until later. [He referred to *Castellain* v. *Preston* (1) and to Arnould on Marine Insurance, 11th ed. Vol. I. §§ 330 and 351.]

The assured had recovered 100 per cent. on the company's policy and the company was entitled to 100 per cent. of the salvage.

Miller in reply. It is unnecessary to reserve in a policy the right to take out a subsequent increased value policy, for such a right is implied.

Cur. adv. vult.

1936. March 31. BRANSON J. read the following judgment: The point to be decided is whether the company is entitled to the whole of the 532*l.* 4*s.* 8*d.* arising as salvage in respect of the cargo insured by them or whether the underwriters are entitled to a proportionate share of that sum.

The case for the company is that having covered the cargo for the whole of its value as agreed between them and their assured in their policies of September 19, 1934, and having paid that amount on a claim for a total loss, they became entitled under s. 79 of the Marine Insurance Act, 1906, to take over the interest of their assured in whatever remained of the subject-matter and that they exercised that right by accepting the cargo owners' letter of subrogation on November 3, 1934. If the dispute were one between the company and their assured the company would clearly be entitled to succeed on the decision of the *North of England Iron Steamship Insurance Association* v. *Armstrong*. (2) The criticisms of some of the dicta in that case do not affect it in its application to the present one, because even if the company recovers the whole of the 532*l.* 4*s.* 8*d.* they will still receive less than the amount paid out by them, which was 685*l.* The ratio decidendi both of the *North of England* case (2) and of *The Thames & Mersey Marine Insurance Co.* v.

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(1) (1883) 11 Q. B. D. 380, 388.
(2) L. R. 5 Q. B. 244.

British & Chilian Steamship Co. (1), in which Scrutton J., as he then was, followed it, was that the amount fixed by the policy as the value of the subject-matter insured was conclusive between the parties to the contract of assurance, so that the assured could not be heard to say that the amount recovered as salvage was based upon a higher value and that he was his own insurer for the excess.

This being admittedly the position as between the company and the assured, the question is whether the underwriters can have any greater right against the company than their assured has. If they can, it must have arisen by operation of law, for the assured had, on November 3, by taking payment as for a total loss from the company and by giving the company a letter of subrogation, divested himself of all his interest in the salvage. The argument for the underwriters is that just as the right of contribution between insurers who have separately issued policies covering the same assured in respect of the same adventure and interest arises independently of any contract between them so there is a correlative right in each insurer to subrogation which is unaffected by any contract between any insurer and the assured. No authority is to be found for this proposition in the case where the original policy was a valued policy, but it is based upon the analogy of the position created by over insurance, by double insurance. Equity, it is urged, decrees that each insurer shall contribute rateably to the sum recoverable by the assured and equity should equally provide for them to share rateably in any salvage. I think the suggested analogy fails in a case like the present. No right of contribution arose as between the company and the underwriters which could form the basis of any right to share in the salvage.

Next it is contended on behalf of the underwriters that as soon as a contract of insurance is entered into there arises a right to subrogation in the event of a total loss being paid, that such right is inchoate only until the loss is paid, and so where successive policies have been effected each policy gives rise to an inchoate right all of which rights crystallize as from the time

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(1) [1915] 2 K. B. 214.

1936

BOAG
v.
STANDARD
MARINE
INSURANCE
CO.

Branson J.

of the casualty causing the loss and so are all equally valid.

It seems to me that this contention is unsound. It depends upon the theory that subrogation arises by operation of law and independently of anything done between the parties. Whatever might have been said for this theory before the Act of 1906 the language of s. 79 is conclusive to show that subrogation is not effected as a matter of course. If it were, an insurer, having paid a total loss, could sue in respect of the subject-matter in his own name, which, so far as I know, has never been allowed. The true view appears to me to be as stated in Phillips on Insurance (5th ed., 1867), vol. ii., para. 1715, where the learned author, quoting from Estrangin, says: " 'Any convention between the owner and freighter cannot affect the rights of the insurer under an abandonment.' The rights of an underwriter cannot be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right."

If there had been evidence that it was so usual nowadays to take out excess value policies that underwriters must be taken to subscribe original policies under an implied condition that the assured might do so the matter would have been different. But there being no such right expressly reserved and no evidence to justify its implication, I think the underwriters fail to show that the company is not entitled to the whole of the 532*l.* 4*s.* 8*d.*

There will be judgment for the company, with costs, and a declaration that the company is entitled to the whole of the 532*l.* 4*s.* 8*d.* deposited with the trustees, and an order that the trustees should pay that sum to the company.

Judgment for the company.

Solicitors for the underwriters: *Botterell & Roche, agents for Weightman, Pedder & Co., Liverpool.*

Solicitors for the company: *Ince, Roscoe, Wilson & Glover.*

J. W. H.

C. A.

1936
March 6.

NASH *v.* STEVENSON TRANSPORT, LIMITED.

[1935. N. 367.]

Road traffic—Goods vehicles—Licence—Trader entitled to licence—Agreement for use of name and tonnage by another person—Illegality—Road and Rail Traffic Act, 1933 (23 & 24 *Geo.* 5, *c.* 53), *s.* 1, *sub-ss.* 1, 3, 8; *s.* 2, *sub-s.* 6; *s.* 6, *sub-s.* 1; *s.* 7, *sub-s.* 2; *s.* 16, *sub-s.* 1; *s.* 21.

The plaintiff, who was entitled by virtue of s. 7, sub-s. 2, of the Road and Rail Traffic Act, 1933, to obtain as of right Class A licences in respect of goods vehicles up to a certain tonnage, did not wish to use those vehicles himself. He entered into an agreement with the defendants, whereby, in consideration of a money payment by the defendants, the defendants were to be entitled to operate the vehicles in the plaintiff's name, under the plaintiff's licences (which could not, by s. 21 of the Act, be transferred or assigned by him to the defendants). The present action was brought by the plaintiff to recover the sum payable under the agreement:—

Held, that, although the agreement did not purport to transfer or assign the plaintiff's licences, it could not be carried into effect without the commission by the defendants of a criminal offence under s. 1 of the Act, since the defendants would be using vehicles in respect of which they had no licence. Nor could the plaintiff, who had licences, but was not the person using the vehicles within the meaning of s. 1, comply with the requirements of s. 16 by keeping, or causing to be kept, the records therein mentioned. The agreement was therefore illegal, and the plaintiff's claim failed.

Decision of Humphreys J. [1935] 2 K. B. 341 affirmed.

APPEAL from a decision of Humphreys J. (1)

The plaintiff, John George Nash, claimed 375*l.* alleged to be due from the defendants, Stevenson Transport, Ld., under an agreement in writing made between the plaintiff and the defendants on May 18, 1934. The defendants admitted the agreement, but alleged that it was entered into with the object of the defendants acquiring by transfer or assignment public carriers' or Class A licences to be obtained by the plaintiff under the provisions of the Road and Rail Traffic Act, 1933 (2) (hereinafter called "the Act"), in respect of the use of vehicles mentioned in the agreement. They said that by s. 21 of the Act such licences were not capable of being transferred or assigned; and that the agreement was illegal, void and unenforceable.

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(1) [1935] 2 K. B. 341.

(2) The Road and Rail Traffic Act, 1933, s. 1, sub-s. 1: "Subject to the provisions of this Part of

Mr. Nash, who traded as the Nash Transport Company, had during the year beginning on April 1, 1932, used goods vehicles belonging to him, or in his possession under a hire

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this Act, no person shall use a goods vehicle on a road for the carriage of goods—

(*a*) for hire or reward; or

(*b*) for or in connection with any trade or business carried on by him,

except under a licence."

Sub-s. 3: "When a goods vehicle is being used on a road for the carriage of goods, the driver of the vehicle, if it belongs to him or is in his possession under an agreement for hire, hire purchase or loan, and in any other case the person whose agent or servant the driver is, shall, for the purposes of this Part of this Act, be deemed to be the person by whom the vehicle is being used."

Sub-s. 8: "If any person uses a vehicle in contravention of this section, he shall be guilty of an offence under this Part of this Act."

Sect. 2 makes provision for three classes of licences known as A, B and C licences respectively.

Sub-s. 6: "The vehicles authorised to be used under a licence shall be—

(*a*) such motor vehicles, being vehicles belonging to the holder of the licence or in his possession under a hire purchase agreement, as are specified in the licence"; . . . . (other classes of vehicles are specified, in each case with the qualification "belonging to the holder of the licence or in his possession under an agreement for hire purchase" or similar words).

Sect. 5 prescribes the method of application, and the particulars to be furnished by an applicant for a licence.

Sect. 6, sub-s. 1: "Subject to the provisions of the next succeeding section, the licensing authority—

(*a*) on an application for an A licence or for a B licence, shall have full power in his discretion either to grant or to refuse the application, or to grant a licence in respect of motor vehicles other than those of which particulars were contained in the application, or in respect of motor vehicles or trailers less in number than, or differing in type from, those for the use of which authorisation was applied for; . . . ."

Sect. 7, sub-s. 2: "If, on an application for an A licence made not later than the first day of April, 1934, or such later date as the Minister may appoint, the applicant shows to the satisfaction of the licensing authority that during the year beginning on the first day of April, 1932, he used any goods vehicles belonging to him, or in his possession under a hire purchase agreement, mainly for the purpose of the carriage of goods for hire or reward, the licensing authority shall grant the application in respect of vehicles having an aggregate weight

C. A.
1936

Nash
v.
Stevenson
Transport,
Ld.

purchase agreement, mainly for the purpose of the carriage of goods for hire or reward, and was entitled under s. 7, sub-s. 2, of the Act to have granted to him licences in respect of vehicles having an aggregate weight unladen of not more than 40 tons, 12 cwt., whereas the grant of such licences to applicants not within s. 7, sub-s. 2, was within the discretion of the licensing authority, and was subject to the giving of notices and to possible opposition.

The plaintiff, not wishing himself to use the licences to which he was entitled, desired if possible to sell to the defendants the benefit of his rights, and the material clauses of the agreement dated May 18, 1934, were as follows :—

" 1. The said John George Nash shall, if he shall not already have done so, lodge his claim for haulage licences Class A in respect of as much tonnage as is allowed to him in respect of the said ownership and wagons.

2. Should such claims be successful to a minimum of 40 tons 12 cwt. unladen weight the sum of 375*l.* shall be paid by the company to the said John George Nash within a fortnight after such final notification has been made to the said . . . . John George Nash.

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unladen not less than the aggregate weight unladen of any such vehicles so used by the applicant at any one time during the said year."

Sect. 11 makes provision for the publication of notices of applications and for objections thereto, but exempts therefrom an application which the licensing authority is bound to grant.

Sect. 16, sub-s. 1 : " Subject to the provisions of regulations made under this section, the holder of a licence shall keep or cause to be kept, in accordance with the regulations, current records showing—(*a*) as respects every person employed by him as a driver or statutory attendant of an authorised vehicle, the times at which that person commenced and ceased work and particulars of his intervals of rest and the like information as respects himself when acting as such a driver or attendant ; (*b*) as respects every journey of a vehicle on which goods are carried under the licence, particulars of the journey and of the greatest weight of goods carried by the vehicle at any one time during the period to which the record relates and the description and destination of the goods carried, and the regulations may make provision for requiring drivers of authorised vehicles to carry the prescribed documents and to make any prescribed entries therein."

Sect. 21 : " Subject as hereinafter provided, a licence shall not be capable of being transferred or assigned : . . . . "

7. The said John George Nash shall grant the company the use of the name of himself and of Nash Transport Company in so far as it is necessary in connection with the running of any vehicles in respect of the licences so to be obtained and shall sign all necessary documents as may be required to that end. . . . .

" 8. Notwithstanding anything contained in this agreement the parties expressly agree and declare that should it be ascertained that the company cannot in law and rightfully obtain the normal and proper use of the licences so to be applied for by the said John George Nash the said sum of 375*l.* shall thereupon be repaid by the said John George Nash to the company . . . ."

Notification of successful claims was made to the plaintiff on November 14, 1934, but the defendants refused to pay the sum of 375*l.* provided for by the agreement, and the plaintiff brought the present action to recover it.

Humphreys J. held that the agreement was unenforceable by reason of illegality and gave judgment for the defendants.

The plaintiff appealed. The appeal was heard on March 6, 1936.

F. W. Beney for the appellant.

Sellers K.C. and *Ian Macaulay* for the respondents.

The arguments sufficiently appear from the judgments.

LORD ROCHE. This is an appeal from a judgment of Humphreys J. The learned judge gave judgment in favour of the defendants in the action, and this is the plaintiff's appeal asking that judgment should be entered in his favour.

The action arose out of an agreement between the parties, dated May 18, 1934. The general nature of the agreement and the circumstances under which it was made can be shortly stated. The plaintiff, Mr. John George Nash, before the making of the agreement, had certain motor vehicles running for him of a capacity of between 40 and 50 tons. Under the Road and Rail Traffic Act, 1933, s. 7, a person in Mr. Nash's position, who at the material date, had such vehicles running for the purpose of his trade, had the right, which was almost, if not quite, absolute, to have fresh licences granted to him for the running of vehicles which would carry a corresponding or equal weight of goods. Mr. Nash was going out of that business, and he was desirous of transferring for a consideration in money, the benefit of those rights which he enjoyed under s. 7 of that Act. For the purpose, if possible, of achieving that end this agreement was entered into. The consideration promised by the defendants was the sum of 375*l.*, and that is the amount claimed.

The defence is that the agreement could not be performed legally and, therefore, was void. Humphreys J. on that issue decided in favour of the defendants, and gave judgment in their favour.

In order to see whether that judgment is right it is necessary to consider the language of the Act, and the language of the agreement. The agreement provided for Mr. Nash applying for the licences which he could apply for under s. 7 of the Act. It then provided that if the applications were successful the sum now in question should be paid, and certain provisions were made if there were a variation in the tonnage in respect of which licences were granted. Clause 7 of the agreement provided that Mr. Nash should grant the company the use of the name of himself and the business name under which he formerly carried on business, in so far as it was necessary in connection with the running of the vehicles in respect of the licences so to be obtained, " and shall sign all necessary documents as may be required to that end." Then follow certain provisions providing for the payment back of the money if it were paid, " should it be ascertained that the company cannot in law and rightfully obtain the normal and proper use of the licences."

That being the agreement, it is now proper to turn to the Act. Sect. 21 of the Act provides : " Subject as hereinafter provided, a licence shall not be capable of being transferred or assigned," and then follows a proviso for a transfer under rules in a certain event or events, such as death, bankruptcy, and so forth, none of which has happened in this case.

C. A.
1936

Nash
v.
Stevenson
Transport,
Ld.

Lord Roche.

It was argued before the learned judge that, in so far as the object of this agreement was to achieve by other methods that which was forbidden under s. 21, the agreement was unlawful, and the defendants had a good answer. So put, the learned judge was acting quite rightly, in my opinion, in rejecting the argument, and any words which have been quoted to us from *In re Mahmoud and Ispahani* (1) as supporting that argument, were I think misunderstood. That is not the really valid objection to this agreement, nor is it the ground on which the learned judge decided. He decided that it was in terms and of itself incapable of being carried out otherwise than illegally. The argument for the appellant is that it could be carried out legally, that, accordingly, it must be deemed to be so carried out, and that therefore it is a lawful agreement. That argument is based upon the well known language of Blackburn J. in *Waugh* v. *Morris*. (2) There the learned judge (delivering the judgment of the Court) said: "We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance."

It is not contended that the second limb of that statement applies here. What is quite obvious is that these parties did not intend that the contract should be illegally performed. On the contrary, clause 8 provided that, should it be ascertained that the agreement could not be performed legally, then it should not be performed at all, and even if the money had been paid and it was ascertained that that would be the result of the agreement, then within a certain time limit the money could be recovered back. Here the money has not been paid at all, but that clause shows that it was plain that the parties did not intend illegal performance of the contract.

(1) [1921] 2 K. B. 716.

(2) (1873) L. R. 8 Q. B. 202, 208.

The question is whether this contract could be legally performed at all. That depends upon what the contract meant and bound the parties to do.

Mr. Beney has contended, in his very able argument, that this agreement could be lawfully performed, because (*a*) Mr. Nash could apply and did apply for the licences, and that when he had obtained them, as he did obtain them, he could run the vehicles. I have used that phrase as a compendious phrase—" run the vehicles "—as covering, in sufficient and popular language, the requirements of the Act. He is to be the person to run the vehicles. The question is: Did the agreement allow for Mr. Nash, the licensee, running the vehicles, or did it by its plain and express terms involve that that was not to be the method of carrying out the agreement, but that Stevenson Transport, Ld., the other parties to the contract, were to be the persons running the vehicles, and that if they could lawfully do so, then the money should be due, and if it could not be lawfully done, then the money should not be due ?

To determine and dispose of that question it is again necessary to look at the Road and Rail Traffic Act, 1933, and it is again necessary to look with more particularity at the agreement. There are two or three provisions in the Act which it is sufficient to deal with. Sect. 1 is the most material. That provides: " (1.) Subject to the provisions of this Part of this Act, no person shall use a goods vehicle on a road for the carriage of goods—(*a*) for hire or reward; or (*b*) for or in connection with any trade or business carried on by him, except under a licence," and by sub-s. 3: " When a goods vehicle is being used on a road for the carriage of goods, the driver of the vehicle, if it belongs to him or is in his possession under an agreement for hire, hire purchase or loan, and in any other case the person whose agent or servant the driver is, shall, for the purposes of this Part of this Act, be deemed to be the person by whom the vehicle is being used."

The result of those provisions undoubtedly is that if these vehicles were used or run by Stevenson Transport, Ld., and their servants drove the vehicles, then they, not being the licensees, would be committing a breach of this s. 1 of the Act of 1933, and would be liable for the penalties provided by sub-s. 8 of that section. There are a number of other provisions, but it is sufficient, I think, to refer to those in s. 16 of the Act. Sect. 16 contains provisions relating to the keeping of records, which are of importance for ensuring that the provisions relating to hours of work are being carried out. They are obviously of the greatest importance to the safety of the public who may be on the roads, since tired and over-tired lorry drivers are a public danger. These provisions of the Act involve that he who is running and using the vehicles shall be the employer of the persons who are driving or actually in charge of the vehicles, and he shall keep records in respect of the user of the vehicles and in respect of the work of the persons in charge.

In my judgment, on a perusal of this agreement, it was the intention of the parties, and the words of the agreement involve, that Mr. Nash should be out of the business, save that his name was to be used. I gather that, in particular, from clause 7 of the agreement, which stipulated that Mr. Nash should grant the company the use of his name in connection with the running of any vehicles—which I am satisfied means running the vehicles by the defendants—and that Mr. Nash should sign all necessary documents. I ask myself, as I asked Mr. Beney: Could Mr. Nash have been obliged to engage these servants to drive these vehicles? The answer is: "Certainly not." I do not agree with one expression which may be found in the judgment of Humphreys J.: "It was not contemplated that Mr. Nash should be owner of the vehicles." The learned judge meant no doubt by that expression that he was not to be the beneficial owner. I think, however, that it was contemplated that the vehicles should stand in the name, the legal ownership, of Mr. Nash, though only as trustee for Stevenson Transport, Ld. But this is a mere matter of form. As to the substance of the case I am satisfied that the learned judge was right in his conclusions, that the running of the vehicles, the supervision of drivers,

C. A.
1936
Nash
v.
Stevenson
Transport,
Ld.
Lord Roche.

the keeping of records, and all the matters which were the obligation of the licensee, were to be done by Stevenson Transport, Ld., and not by Mr. Nash. And I am satisfied also that they were not even to be done by Mr. Nash for Stevenson Transport, Ld. In short the person who was going to use the vehicles was not and could not be the person licensed to use them. In those circumstances, in my opinion the conclusion of the learned judge was abundantly right—that the very nature of the agreement, the very language of the agreement involved that it was to be carried out in that manner, and that that manner was unlawful. It therefore follows that the agreement was not binding. It follows that it cannot be successfully sued on at law, and the decision of the learned judge to that effect is right. I am therefore of opinion that this appeal should be dismissed, with the usual consequences.

Scott L.J. I agree and have little to add; but as the question is one of general importance, I desire to add a few words. The Act clearly contemplates that the licensee, when he asks for a licence and, I think, while he holds the licence, remains the owner of the vehicles in respect of which he gets his licence. The measure of the licence is the unloaded weight of the vehicles which he is to be allowed to have. In the case of vehicles which have been running previously to March 31, 1933—twelve months from April 1, 1932—the granting of a licence to the owner of those vehicles is obligatory under s. 7, but I think it is quite clear this contemplates that the licensee should be the owner. It is also, in my view, contemplated that the public duty of seeing that the conditions on which licences are granted contained in s. 8—which relates to the vehicle's fitness and its serviceableness—and in s. 16—which relates to the records of hours of service of the men actually driving them—should be discharged by the licensee. He can only discharge those duties if he remains in control of the vehicles, or, to use the words of the judgment, if he is running them, and, in my view, it is essential that the licensee should retain in his own hands the effective control over the running of the vehicles in respect of which he has the licences. I do not myself think it is necessary to discuss the terms of the Act any further for the purposes of this case.

In my view, as Lord Roche has already said, the agreement contemplates that the running of the vehicles should be a running, not by the licensee but by a company which was not licensed. That to my mind is the only possible interpretation of the agreement as a whole in the light of the circumstances —which appear in the correspondence—in which it was made and, in particular, of clause 7 of the agreement. If the Act contemplates the owner retaining control in order to ensure the performance of the conditions of the licence—the conditions imposed by the Act under ss. 8 and 16—then it will be absolutely essential that his name as licensee should remain and that he personally should be responsible for the running of the vehicles. Clause 7 of the agreement in effect, in my opinion, says this: " Mr. Nash is selling his rights because he is going out of business; what he wants to get is the 375*l.*; he agrees that if it is necessary, for the purpose of preserving the licence to which he is entitled, that his name should still appear in connection with the running of the business"; then he agrees that his name shall be used in that kind of way and that he will sign any documents. In my view, that was put in just because he was not going to have the running of the business himself, and one cannot attach any reasonable meaning to the clause, except that. If that is so, then the agreement was quite definitely an agreement for the purpose of doing that which is prohibited by the Act, and that makes the agreement illegal.

There is the further point arising out of the earlier correspondence which was read, and treated before the learned judge as part of the evidence in the case, from which I think the conclusion is that as Mr. Nash was going out of business and, wanting to sell the goodwill of the licences to somebody else, he did not intend to have anything more to do with the operation of the vehicles which were going to be allowed to run under those licences. That, to my mind,

C. A.
1936

NASH
v.
STEVENSON
TRANSPORT,
LD.

Scott L.J.

would be directly contrary to s. 1, sub-s. 1, of the Act, which says: "No person shall use a goods vehicle on a road for the carriage of goods—(*a*) for hire or reward; or (*b*) for or in connection with any trade or business carried on by him, except under a licence." If the meaning of that is, as I think it is from the other sections of the Act, that the licensee must be the person who is running the vehicles, then the intention on the part of Mr. Nash was an intention to use the agreement with the company for the purpose of doing or assisting in an act prohibited by the statute, and that, to my mind, apart from the interpretation of the agreement, will constitute a transaction with an illegal object within the meaning of the cases and make the money irrecoverable under the agreement in any event.

EVE J. I think that this is a plain case, and I see no alternative but to dismiss the appeal, with costs.

Appeal dismissed.

Solicitor for appellant: *Ernest C. Randall.*

Solicitors for respondents: *Field, Roscoe & Co., for Luya & Williams, Liverpool.*

W. I. C.

Followed. COON *v.* DIAMOND TREAD CO. (1938), LTD. [1950] 2 All E.R. 385.

C. A.
1936
March 31;
April 1, 7.

WHITE *v.* ALTRINCHAM URBAN DISTRICT COUNCIL.

Workmen's compensation—Costs—Taxation—Fees paid to medical witnesses—Allowance of part only by registrar on taxation—Jurisdiction of county court judge to review quantum—Workmen's Compensation Rules, 1926, *rr.* 76, 78*—County Court Rules, Order* LIII., *rr.* 7, 8.

In the taxation of costs the County Court Rules and the Workmen's Compensation Rules give a discretion to the registrar of the county court which cannot be interfered with by the county court judge on a question of amount when the discretion is otherwise properly exercised.

A bill of costs in a case under the Workmen's Compensation Act included fees paid to three medical witnesses—two for 8*l*. 8*s*. each and one for 10*l*. 10*s*. On taxation the registrar reduced the fee to be allowed to each of those witnesses to 3*l*. 3*s*., stating that he did so in the exercise of his discretion and after careful consideration of the relevant circumstances. On the hearing of an application to review, the county court judge increased the allowance for each of the three witnesses to 7*l*. 7*s*.

On appeal:—

Held, that the county court judge had no jurisdiction to interfere with the discretion of the registrar in fixing the quantum of allowance for the medical witnesses.

APPEAL from Altrincham County Court.

The applicant claimed compensation under the Workmen's Compensation Act, 1925, in respect of injuries sustained by him arising out of and in the course of his employment. At the hearing, the evidence given on his behalf did not in the county court judge's opinion support the claim as made, but as it might support a different claim leave was given for an amendment on the terms that the applicant should pay the employers' costs which had been thrown away, the costs to be taxed by the registrar. Included in the employers' costs were fees paid to three medical witnesses, two for 8*l*. 8*s*. each and one for 10*l*. 10*s*. On taxation the registrar allowed only 3*l*. 3*s*. for each witness.

On objections to the taxation carried in by the employers, the registrar stated his reasons as follows: "With regard to the allowances made to the medical witnesses in respect of their attendance at Court, it will perhaps be sufficient to say that in the exercise of the discretion confided to taxing officers with regard to allowances to witnesses and after careful consideration of the relevant circumstances I was, and am, of opinion that the allowances made are adequate. It will be observed that the objections are limited to a statement that the sums allowed are 'not reasonable,' which, being a positive statement unsupported by reasons on a matter within the discretion of the taxing official, it will perhaps be deemed sufficient to say that my discretion in this regard has been, to the best of my ability, exercised fairly and reasonably, and it is submitted, without the infringement of any principle or omission to give due consideration to all relevant facts."

On an application for a review of taxation, the county court judge, in allowing the appeal as to the amount of the fees to the medical witnesses, held that *7l. 7s.* was a reasonable allowance for each, and said: "In exercising my discretion in this particular case as to what should be a reasonable allowance for attendance, I had regard to (1.) the nature of the injury to the workman and the alleged consequential symptoms; (2.) the difficulty of the surgical and medical questions which might arise; (3.) the advantage under the circumstances to have expert testimony from distinguished members of the profession; (4.) the fee usually payable to such members to secure their attendance as witnesses in Court at a distance from the centre where they practise; (5.) my knowledge that in most if not all my Courts in Circuit No. 7 allowances from five to eight guineas have in fact been made on taxation of such witnesses for similar attendances."

The workman appealed.

Sellers K.C. and *Spafford* for the appellant. On a taxation of costs, whether in the county court or in the High Court, it has long been the rule that the decision of the taxing officer is, generally speaking, final on questions of quantum: *Alsop* v. *Lord Oxford* (1); *In re Ogilvie's Estate* (2); and *Slingsby* v. *Attorney-General.* (3) Here it cannot be said that the registrar erred on any question of principle; that being so, his discretion as to the proper fees to be allowed to the medical witnesses cannot be interfered with. [They referred to County Court Rules, Order LIII., rr. 7, 8; and Workmen's Compensation Rules, 1926, rr. 76–78.]

Smylie for the respondents. The position of the registrar as to taxation of costs in the county court is not the same as that of the taxing officer in the High Court. Moreover, by Order LIII., r. 8, sub-r. 2, of the County Court Rules, allowances by the registrar are "subject to review by the judge." Those

(1) (1833) 1 Myl. & K. 564.
(2) [1910] P. 243.
(3) [1918] P. 236.

words are not in the Rules of the Supreme Court, and effect must be given to them.

Sellers K.C. in reply cited *Hill* v. *Peel*. (1)

Cur. adv. vult.

April 7. The following judgments were read :—

SLESSER L.J. This appeal, which is most important, affecting jurisdiction as to taxation of costs in all county court cases, arises in this way : On November 8, 1935, an interlocutory order was drawn up and thereafter the costs said by the respondents to have been thrown away were taxed on scale "B." As to certain of these costs there is now no dispute, but with regard to three claims for fees for three doctors, two for 8*l*. 8*s*. and one for 10*l*. 10*s*., claimed by the respondents, on the matter being taken before the registrar for taxation, 3*l*. 3*s*. each were allowed. There was an appeal by the respondents to the judge as to these and other items. The learned judge disallowed the objections to the other items but ordered that the items eight, nine and ten for the three doctors should be increased by 4*l*. 4*s*. each, and held that 7*l*. 7*s*. was a reasonable allowance in each case for the attendance in court of these medical witnesses.

It is objected by the appellant that the learned county court judge, in these circumstances, had no right to vary a decision of the registrar merely upon quantum and that the rules under the Workmen's Compensation Act and under the County Court Acts give a discretion to the registrar which cannot be interfered with by the judge on a question of amount when the discretion is otherwise properly exercised.

The point raised is a very important one, and, as I have said, goes to the whole practice of taxation in the county court. It is not rendered less important because the learned county court judge tells us that in his long experience he has often so exercised a discretion. In the present case he says that in most if not all of his circuits allowances from 5*l*. 5*s*. to 8*l*. 8*s*. have in fact been made on taxation to such medical witnesses for similar attendances.

(1) (1870) L. R. 5 C. P. 172, 180.

As regards the Workmen's Compensation Rules, the question of costs is dealt with in rr. 76 and 78 and in Sch. I., para. 7, of the Workmen's Compensation Act, 1925. By this paragraph the costs of and incidental to the proceedings are in the discretion of the judge, and by sub-para. 2 it is provided that the costs shall be taxed in manner described by the rules and such taxation may be reviewed by the judge. By clause 1 of r. 76 the costs directed to be paid by one party to another shall be taxed according to such one of the scales of costs applicable to actions in the county court as the judge shall direct, and generally the provisions of Order LIII., rr. 7 and 8, of the County Court Rules are to apply, including allowances and taxation of costs and objections to and reviews of taxation by the registrar. Rule 78 of the Workmen's Compensation Rules provides that an application to the judge to review any taxation shall be heard and determined upon the evidence brought in before the registrar and no further evidence be received unless the judge otherwise directs. Further, by r. 76 if there is no direction as to scale of costs by the judge at the trial the costs are to be taxed according to the scale which would be applicable if the proceedings had been an action in the county court.

It is necessary next to consider rr. 7 and 8 of Order LIII. of the County Court Rules above referred to. By r. 7 an order or decision of the judge or registrar on any of the discretionary items in the scale of costs or for allowances of any particular costs under any of the County Court Rules are a special order and the registrar has no power to allow an item which has been expressly disallowed by the judge and the order or decision of the registrar as to the allowance or disallowance of any item is subject to review by the judge. In the present case no special order has been made and consequently r. 7 does not apply, nor does r. 8, sub-r. 1, which allows the judge or registrar in his discretion to order that certain items mentioned in the scale of costs shall be allowed in addition to or in substitution for certain costs to which the successful party would otherwise be entitled. But these rules are important in that they indicate that where the judge himself is given an original discretion the matter is specifically mentioned.

The present case falls within r. 8, cl. 2, which provides that where costs are taxed under a column applicable, the amount may, in the case of allowances to scientific witnesses, among others, be increased by a reasonable amount at the discretion of the registrar in accordance with r. 23, which provides that all fees or allowances which are discretionary shall unless otherwise provided be allowed at the discretion of the registrar, who shall take into account various circumstances there stated. It is to be observed that this rule as to the considerations by which the taxing officer's discretion must be exercised are almost similar in terms to those contained in the Supreme Court Rules, Order 65, r. 27, sub-r. 38.

Rule 8, sub-r. 2, of Order LIII. of the County Court Rules also states that the discretion of the registrar is subject to review by the judge. The judge has also power himself to increase the amounts under r. 8, sub-r. 2, by special order. But the present case does not fall within that category. It is not disputed that the judge here purported to make his increase by way of appeal only.

In my opinion the judge had no power to disturb the discretion of the registrar expressly given him by the rule on a mere question of quantum unless the registrar has purported to exercise that discretion in a way not warranted by law. That such a view has long been held in proceedings in the Supreme Courts cannot be disputed. In *Alsop* v. *Lord Oxford* (1) the Master of the Rolls said: "Generally speaking, the decision of the Master on taxation is final; he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it . . . . The Court will only interfere where the Master acts upon some mistaken principle." Of cases since the Judicature Act it is sufficient to cite what Buckley L.J. said in *In re Ogilvie's Estate* (2) and quoted with approval by Swinfen Eady L.J. in *Slingsby* v. *Attorney-General* (3) to the effect that "on questions of quantum the decision of the taxing Master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application to review his decision." In *Slingsby's* case (1) Swinfen Eady L.J. proceeds thus: "The decision of the taxing Master is not absolutely final even on a question of quantum. For instance, a large sum might be allowed, but from the very fact of the amount the Court might see that the Master, in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done." In the present case, the reasons given by the learned judge cannot be based upon any such assumption, nor is it seriously argued that the registrar improperly exercised his discretion.

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(1) 1 Myl. & K. 564.

(2) [1910] P. 243, 245.

(3) [1918] P. 236, 239.

That the Judicature Act made no difference to the practice in this matter is shown by the fact that in *Slingsby's* case (2) the Court cited with approval *In re Catlin* (3) in which the Master of the Rolls said: "It is admitted, on both sides, that this Court can only be called upon to determine the propriety of allowing or disallowing items which involve some principle, and not where a question only of quantum arises": see also *Hill* v. *Peel.* (4)

A distinction was sought to be made in the present case between the High Court and the County Court Rules in that it was argued that in the High Court problems of increases of allowances do not arise, but this is not accurate, for under Order 65, r. 27, sub-r. 29, the taxing Master still has in special cases an unfettered discretion: see *In re Ermen* (5) discussing this matter; and such increases, like other determinations which find expression in the certificate of the taxing Master under Order 65, r. 27, sub-r. 41, may be reviewed by the judge but only on the principles above stated.

It follows, therefore, that the principles to be applied in the High Court and in the county court on this matter are similar, and those principles, applied to the present case, prevented the county court judge increasing the fees for these doctors as subjects for taxation beyond the sums fixed by the registrar in his discretion.

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(1) [1918] P. 236, 239.
(2) [1918] P. 236.
(3) (1854) 18 Beav. 508, 509.
(4) L. R. 5 C. P. 172.
(5) [1903] 2 Ch. 156.

The appeal will be allowed with costs here and below and the increases ordered by the judge must be deducted from the costs to be paid by the applicant as a condition of his proceeding with the arbitration.

Greene L.J. This appeal raises a question of importance with regard to the principles on which the power of a county court judge to review decisions of the registrar as taxing officer ought to be exercised. The rule that the decision of a taxing officer on questions of quantum ought not to be overruled by the judge on a review of taxation has long been established. This rule, in my opinion, applies generally to taxations in the county court as it applies to taxations in the High Court, and it is only in exceptional circumstances (which do not exist in the present case) that a decision of the taxing officer on a question of quantum should be overruled. The relevant County Court Rule in the present case is Order LIII., r. 8, sub-r. 2. Under this rule the registrar is given a discretion to increase by a reasonable amount the amounts allowable under any item in the scales. This discretion is to be exercised by the registrar in accordance with Order LIII., r. 23, and his decision is subject to review by the judge. Order LIII., r. 8, sub-r. 2, also provides that the increase may be allowed by special order of the judge, but in the present case no such order was made, all matters being left to taxation in the usual way. Order LIII., r. 23, provides that in this case, as in the case of all discretionary fees and allowances, the registrar in the exercise of his discretion shall take into account the various matters there specified. The general provisions as to taxation and review of taxation under the County Court Rules are to be found in Order LIII., r. 1, which provides that all costs shall be taxed by the registrar according to the scales in Part 4 of the Appendix subject to the review of such taxation by the judge and in Order LIII., r. 49, which provides generally for review of taxation by the judge. Order LIII., r. 49, sub-r. 1, is similar in its terms to Reg. 41 of Order 65, r. 27, of the Rules of the Supreme Court under which it has always been held that apart from exceptional cases the discretion of the taxing officer on questions of quantum should not be interfered with.

During the course of the argument it at one time appeared to me that there was something to be said for the view that, as Order LIII., r. 8, sub-r. 2, is essentially a rule dealing with quantum and the decision of the registrar is by the rule itself expressly made subject to review by the judge, the rule must be taken to contemplate that this exercise of discretion on questions of quantum should be subject to review by the judge notwithstanding the general principle to which I have referred. In support of this argument it is to be observed that where individual rules of the Supreme Court make provision for increases in scale allowances at the discretion of the taxing officer there is no express provision that his decision is to be subject to review by the judge, the matter being governed by the general provisions as to review which are contained in Regulation 41 of Order 65, r. 27. As an example I may refer to Regulation 3 of Order 65, r. 27. On consideration I have come to the conclusion that this argument cannot be accepted. At the date when the County Court Rules were framed the principles upon which decisions of a taxing officer ought to be reviewed by the judge were well established. When those rules give a power to review they must I think be construed in relation to those principles ; and the mere fact that Order LIII., r. 8, sub-r. 2, of the County Court Rules expressly says that the decision of the registrar in increasing a scale allowance is to be subject to review by the judge is in my opinion insufficient to justify us in construing that provision as contemplating a review on any principle other than the established one. It is to be observed that Order LIII., r. 8, sub-r. 2, expressly gives the registrar a discretion, while r. 23 (which corresponds to Reg. 38 of Order 65, r. 27, of the Rules of the Supreme Court) lays down the principles upon which that discretion is to be exercised. If in any case the registrar in making a discretionary increase in the scale allowance acts on a wrong principle or takes into account matters which he ought not to take into account, or omits to take into account matters which he ought to take into account, his decision may be reviewed by the judge. Where this is not the case and he has properly exercised his discretion the judge ought not to overrule his decision on a mere question of quantum in the absence of some exceptional circumstances. In the present case it is not suggested that the registrar erred in respect of any of these matters, the only criticism of his decision being that it was insufficient in point of amount. I agree that the appeal should be allowed.

SCOTT L.J. This appeal raises a question of general public importance because it affects the policy of our legislation about the costs of litigation in the county courts, or, at any rate, certain of the statutory means by which those costs are kept low. It raises directly the question whether the discretion of the registrar—the statutory Taxing Master—is final as in the High Court, and indirectly touches the fixed scale system which under the Act of 1888 is the basis of all county court taxation. The question turns on the true interpretation of the relevant statutes and rules. The workman had on January 8, 1936, been ordered by the judge of the Altrincham county court to pay employers' costs of certain proceedings. The employers' bill was in due course taxed by the registrar, scale B being the scale applicable. He disallowed or reduced various items, but only three items are material to this appeal. They were fees for medical witnesses who had given evidence for the employers, two surgeons and a neurologist. In the bill brought in for taxation the items stood as follows: "Dr. Kerr, attending court 8*l.* 8*s.*, Mr. Burt Hamilton, qualifying 3*l.* 3*s.*, attending court 10*l.* 10*s.*, Dr. Garden, attending court 8*l.* 8*s.*" The registrar reduced the items in each case to an inclusive fee of 3*l.* 3*s.* Objections were lodged on the ground that "the sums allowed were not reasonable"; but he overruled the objections, on grounds stated in his written answers: "It will be observed that the objections are limited to a statement that the sums allowed are 'not reasonable,' which being a positive statement, unsupported by reasons on a matter within the discretion of the taxing official, it will perhaps be deemed sufficient to say that my discretion in this regard has been, to the best of my ability, exercised fairly and reasonably, and it is submitted without the infringement of any principle or omission to give due consideration to all relevant facts." The limits of the scale costs for expert witnesses are stated on p. 1094 of the Annual County Court Practice, 1936. On scale B it will be seen that a qualifying fee, if allowed (normally by the judge at the hearing) is 1*l*. 1*s*. to 3*l*. 3*s*., and for attendance (per diem) the fee is 1*l*. 1*s*. to 2*l*. 2*s*.

The employers then applied to the learned judge to review the registrar's decisions, submitting in each case that 3*l*. 3*s*. was "not a reasonable allowance," and on January 8, 1936, the judge increased each of the three items from 3*l*. 3*s*. to 7*l*. 7*s*., on the ground that in his discretion he thought 3*l*. 3*s*. was too little. Before us it was submitted for the workman that the learned judge had no discretionary power to interfere with the discretion of the registrar; that there were no grounds for any suggestion that the registrar had applied any wrong principle, and, in short, that the judge had no jurisdiction to make any alteration whatever, or to substitute his discretion for the registrar's.

Our decision must rest upon our interpretation of the actual language used in the statutes and rules applicable, and the crucial provisions are in fact those applicable to county court costs in general. But those provisions were framed in the nineteenth century in the light of the practice and principles followed in the superior courts. It is therefore essential, first of all, to note what was the language of the provisions affecting those courts when the county court statutes and rules were framed, in order to see if there is any, and what, significant difference between the two. For this purpose it is fortunately not necessary to make any detailed historical research as there is no suggestion that the relevant provisions of Order 65 of the Rules of the Supreme Court (which contains all that is material) effected any change in regard to review by the judge of a taxation by the taxing master; nor was it suggested to us that the County Courts Act, 1888, and the Rules thereunder effected any material change of practice in regard to the inferior courts which preceded the county courts. It is sufficient therefore to compare Order 65 of the Rules of the Supreme Court with the relevant provisions as to county courts under and pursuant to the Act of 1888. This comparison must begin with a consideration of the High Court position. Order 65, r. 27, reg. 41, is the dominant provision; the relevant parts are as follows: "Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may . . . . apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid." It might be thought that this language gave the judge an unfettered discretion to reconsider anything whatever decided by the taxing master; but this would be a wholly wrong interpretation as is clear from the following decided cases. In *Hill* v. *Peel* (1) in the judgment of the Court, consisting of Bovill C.J., Willes and Brett JJ., upon three election petitions the principles on and the extent to which the High Court will interfere with the discretion of its Taxing Masters were laid down in general but very definite terms as follows: (2) "A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case; and where, after properly considering the matter, the Master has arrived at a decision, it lies upon those who impeach his decision to satisfy the Court that he is wrong. Where a principle is involved, the Court will always entertain the question, and, if necessary, give directions to the Master; but where it is a question of whether the Master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with

(1) L. R. 5 C. P. 172.

(2) Ibid. 180.

the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to show that the officer is wrong in the judgment which he has formed." On a particular aspect of one of the cases then before the Court, Willes J. dissented, but his dissent in no way affected the enunciation of the principles contained in the above extract from the judgment of the Court as a whole.

In *In re Ogilvie's Estate* (1) the Court of Appeal laid down the general principle of the discretion of the taxing master in the High Court in similar language and perhaps even more strongly, treating the rule as long settled. Cozens-Hardy M.R. adopted the statements of the principle by two of his predecessors, Sir John Leach in *Alsop* v. *Lord Oxford* (2) and, twenty years later, Sir John Romilly in *In re Catlin* (3) in which he said: "It is admitted, on both sides, that this Court can only be called upon to determine on the propriety of allowing or disallowing items which involve some principle, and not where a question only of quantum arises." Buckley L.J. was equally definite (4): "On questions of quantum the decision of the Taxing Master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application to review his decision. In questions of quantum the judge is not nearly as competent as the Taxing Master to say what is the proper amount to be allowed; the Court will not interfere unless the Taxing Master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the Taxing Master is conclusive. I think that the learned judge ought not to have interfered." Kennedy L.J. said (4): "I am of the same opinion. I only desire to say that, speaking from my own recollection, what has been stated to be the practice in the Chancery Division is the practice in the King's Bench Division, and I see nothing in any of the Probate Rules to which we have been referred to give the least ground for holding that there is any difference in the practice of the Probate Division which would justify us in upholding the decision of the learned judge."

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(1) [1910] P. 243.

(2) 1 Myl. & K. 564.

(3) 18 Beav. 508.

(4) [1910] P. 245.

It is next necessary to consider the language of the statutes and rules applicable to the taxation of costs under the Workmen's Compensation Act, 1925 (there being no suggestion of any material difference between the original Act of 1897 and later legislation on the subject of workmen's compensation). The essence of the system is that the taxation of costs is entrusted to the registrar of the county court in all cases like the present where the county court judge acts as the arbitrator under the Act: see Act of 1925, Sch. I., cl. 7, sub-cl. 2: "The costs, whether before a committee or an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules and such taxation may be reviewed by the judge of the county court." Sect. 27 of the Act confers power on the rule-making committee, appointed under the County Courts Acts, 1888, s. 164, and 1919, s. 24, to make rules having "full effect" when allowed by the Lord Chancellor, for the purpose (inter alia) of "generally carrying into effect this Act so far as it affects the county court and . . . . proceedings in the county court."

Rule 76, para. 1, of the Workmen's Compensation Rules made under the above powers in effect applies both the county court scales of costs and the county courts statutory provisions and rules as to taxation of costs and as to objections to and review by the Registrar. Para. 4 provides: "Where proceedings are taken for which no provision is made by these rules or by the scales of costs, reasonable costs may be allowed in respect of such proceedings by the registrar, subject to review by the judge, or by special order of the judge, not exceeding those which may under the scales be allowed in respect of proceedings of a like nature." Rule 78 contains provisions for review by the judge of a taxation by the registrar, para. 2 forbidding fresh evidence unless the judge otherwise directs, and para. 4 directing an entry of the result of the review on the register.

It is to the statutory enactments and rules of the county courts that we must turn to fill in the rest of the picture. It is a distinguishing feature of the county courts law of costs that quantum is not left at large, dependent on the discretion of the taxing officer as in the High Court, but is within certain limits fixed by scales and items. In the High Court taxing practice of old standing had in effect produced administrative results which were not dissimilar in effect. But it is noteworthy that in dealing with the important topic of costs in county courts Parliament itself decided that the scales of costs should be expressly regulated by the rules which it directed the Rules Committee to make (see s. 164 of the Act of 1888), no doubt with a view to making certain that the scale of costs should be kept reasonably low. The same section delegated very wide rule making powers to the Rule Committee subject to allowance or alteration by the Lord Chancellor and the concurrence of the High Court Rule Committee. Where not otherwise provided for in the County Court Rules, the High Court Rules were to apply.

Order LIII. of the County Court Rules is the costs Order and it is on the true interpretation of that Order that this appeal depends. It therefore calls for careful scrutiny. Does it follow the analogy of the High Court relationship between the Court and its taxing officer, in which case the discretion of the latter, properly exercised, is final ? or does it substitute a new system in English law under which the judge may overrule the discretionary view of the Court's taxing officer and replace it in his own discretion with his own view ? Having regard to the ancient and notorious character of the principle followed by the Court of Chancery and by the common law and other courts which were amalgamated into the High Court, that a review by the judge of a taxation by the taxing master was not a discretionary re-hearing but wholly or at least substantially an appeal on legal grounds only, it is right to approach the problem of interpreting the county courts legislation (both primary and delegated) with the assumption that if it was intended to alter so well-known a principle, that intention would be expressed in clear language ; and, conversely, if the language is found to be substantially similar to the language used in the parallel High Court context, it would be wrong to read into it an intention to depart from the long established construction put upon the High Court language.

In my view there is nothing in either s. 118 of the County Courts Act or in Order LIII. to justify any inference of radical change. The language is so similar to the High Court language that I can see no room for doubt; but if there be any, it would in my view be wrong to resolve it in favour of change. There is the further consideration that such a change would be contrary to the spirit of our county courts legislation which is to encourage speedy and cheap justice, as appears, for instance, in the provision that there shall be no appeal from the judge on fact but only on law, and in the provisions already quoted which within rather narrow limits fix the quantum of costs items. With these reflections in mind let us turn to s. 118 of the Act of 1888: " All costs and charges between party and party shall be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force." It is noteworthy that this section says only " taxed by the Registrar " and " his taxation may be reviewed by the judge." Now consider Order LIII., r. 1 of which says: " In every action or matter in any court all costs shall be taxed by the registrar of such court according to the scales of costs in Part IV. of the Appendix, subject to the review of such taxation by the judge." Note again the simple phrase " subject to the review of such taxation by the judge." The scales and items appear in Part IV. of the Appendix to the Rules (see Annual County Courts Practice (1936), p. 1067). Rule 7 deals with discretionary items and provides that " the order or decision of the registrar as to the allowance or disallowance of any item shall be subject to review by the judge." Rule 8, sub-r. 2, provides: " Where costs are taxed under column B or column C, the amounts allowable under any item in the scales (including the items relating to plans, drawings, charts or models, and the allowances to expert and scientific witnesses) may, regard being had to the length, difficulty or importance of the case, be increased by a reasonable amount at the discretion of the registrar (to be exercised in accordance with r. 23 of this Order), subject to review by the judge, or by special order of the judge." Rule 8, sub-r. 3, contains similar provisions as to counsel's fees, brief, etc. Rule 20 forbids any allowance for costs not sanctioned by the scale (with certain exceptions). Rule 21 says: " When under the scales or rules a discretion as to allowances to be made is vested in Registrars, they are required to exercise such discretion with care and discrimination, and strictly in accordance with the particular directions set forth in the scales and rules." Rule 23 deals at length with the discretion of the registrar and is therefore specially important: " All fees or allowances which are discretionary shall, unless otherwise provided, be allowed at the discretion of the registrar on taxation, who, in the exercise of such discretion, shall take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the action or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances." Rule 37 permits allowances to witnesses to be " increased or decreased " (that is, from the scale) " at the discretion of the registrar subject to review by the judge or by special order of the judge." Rule 42 is worth noting for the contrast: " Seamen necessarily detained on shore for the purpose of an action or matter shall be allowed such remuneration as the judge may order, or, in the absence of an order, as the registrar may think reasonable compensation for their loss of time." Rule 43 relates to expert witnesses but is concerned with the conferring of the right to a fee for qualifying or attendance, and does not touch quantum (which is covered by r. 23). Rules 47 and 48 provide for a review by the registrar of his own taxation on objections lodged. Rule 49 fills in the details of s. 118 of the Act, but it does not contain anything which appears to me to throw light on the question whether we are to interpret the word "review" in s. 118 in a sense different to the High Court sense.

I have now exhausted all the material, having been right through all the provisions which are directly or indirectly relevant. There are certain of the rules which seem at first sight verbally consistent with the judge having the right to correct as he thinks fit in exercise of a complete though judicial discretion; but it is noteworthy that nowhere is there any departure from the word "review"; he is not given like the registrar power even to "reconsider" (see r. 48 for the use of this word as applied to the registrar). The bare wording of s. 118 thus remains, and we have no need to discuss any question of the rules going beyond the limitation of the Act (although I suggest the deletion of the words "It seems that" in the note on ultra vires on p. 221 of the Annual County Courts Practice for 1936). On the whole survey I come to the conclusion that a county court judge has been given no wider discretion than a High Court judge on a review of the taxation performed by the taxing officer of the court, in whom the discretion is, I think, vested. And I have the additional satisfaction of feeling that this conclusion conforms to the general policy of Parliament in regard to county court legislation. The appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Rochester Pusey & Co., for T. A. Needham & Son, Manchester.*

Solicitors for respondents: *Wood, Lord & Co., Manchester.*

J. S. H.

C. A.

1936

April 24.

LEESON *v.* LEESON.

Appropriation of payments—Intention of party making payment uncommunicated to other party—Two debts owed by husband to wife—Payment of money to wife—Intention of husband to appropriate it to one debt—Intention uncommunicated to wife—Right of wife to appropriate payment to other debt.

An appropriation of a payment cannot be inferred from an intention in the mind of the debtor uncommunicated to the creditor. It can only be inferred from circumstances known to both parties.

A husband and wife separated under an oral agreement by which the husband agreed to pay his wife 3*l.* a week for the maintenance of herself and their child, Barry. Later the parties entered into a written agreement by which the husband agreed to pay the wife 300*l.* by weekly instalments of 2*l.* a week in respect of certain premises which belonged to them jointly. The agreement provided that on the failure of the husband to pay any instalment he became liable to pay forthwith the balance of the 300*l.* then due. The husband afterwards sent to his wife 5*l.* each week under the two agreements. The wife subsequently obtained a decree nisi for the dissolution of her marriage, and the husband after the lapse of a week, on the advice of his counsel in the Divorce Court, sent each week to the wife 3*l.* only. The wife sued the husband to recover 92*l.* as being due under the written agreement in respect of the purchase of the house. The husband alleged that he had appropriated the 3*l.* which he sent each week as to 2*l.* in respect of the weekly instalments due under the written agreement, and as to 1*l.* for the maintenance of the child Barry, and he alleged that he sent a slip to his wife with the first payment of 3*l.* containing the words: "This is for the house and Barry." The wife, however, denied having received the slip. No notice to produce it was given. The county court judge, however, admitted secondary evidence of its contents, and held that, even if the slip was not sent, the husband had appropriated the payments to the weekly instalments due in respect of the house.

On appeal by the wife it was admitted that secondary evidence as to the contents of the slip was inadmissible:—

Held, that there must be something more than an intention of the debtor uncommunicated to the creditor to amount to an appropriation by the debtor; there must be a notice, express or implied, to the creditor to inform him of the appropriation. There was no evidence upon which the county court judge could find that there had been an appropriation by the debtor.

APPEAL from a decision of the judge of the Rugby County Court.

The plaintiff, Mrs. Leeson, was formerly the wife of the defendant. Prior to March 27, 1933, the plaintiff and defendant had separated under an oral agreement by which the defendant agreed to pay the plaintiff 3*l.* a week for the maintenance of herself and their child Barry. On March 27, 1933, the parties entered into a written agreement whereby 300*l.* was payable by the defendant by weekly instalments of 2*l.* in respect of premises, The Thatched House, Kilsby, which belonged jointly to the husband and wife. The agreement provided that on the failure of the husband to pay any instalment he became liable to pay forthwith the balance of the 300*l.* then due. From the date of that agreement the defendant sent to the plaintiff each week 5*l.*, being 3*l.* under the oral agreement for separation and 2*l.* under the agreement in respect of the house.

On March 22, 1935, the plaintiff obtained a decree nisi for the dissolution of her marriage with the defendant which was subsequently made absolute. The defendant sent the full 5*l.* for the next week after March 22. On April 2, 1935, however, and each week thereafter, the defendant sent the plaintiff the sum of 3*l.* only.

The plaintiff sued the defendant to recover 92*l.*, as being the balance due under the written agreement of March 27, 1933.

The defence set up by the defendant was that he had appropriated the payment of 3*l.* as to 2*l.* in respect of the weekly instalment due under the agreement of March 27, 1933, and as to 1*l.* for the maintenance of his child Barry.

On the trial of the action at the Rugby County Court the plaintiff proved the agreement by the defendant to purchase the house and to pay her 300*l.* therefor by weekly instalments of 2*l.*, and the fact that after April 2, 1935, she had received from the defendant only 3*l.* a week instead of 5*l.* as formerly, which she said showed a failure by the defendant to pay the weekly instalments of 2*l.* due under the written agreement of March 27, 1933. In cross-examination she denied that any slip of paper as alleged by the defendant was enclosed in the envelope sent by the defendant to her on April 2, 1935, with the 3*l.*

The defendant said in evidence that he sent to the plaintiff only 3*l.* on April 2, 1935, and in the subsequent weeks, instead of 5*l.* as formerly in consequence of the advice which he had received from Mr. Mortimer, his counsel in the Divorce Court, that after the decree nisi he was no longer liable to make the weekly payments for maintenance under the separation agreement, and that with the first payment of 3*l.* on April 2, 1935, he had inserted in the envelope a slip of paper bearing the words: "This is for the house and Barry. Billy," meaning thereby that he had appropriated the sum of 3*l.* as to 2*l.* towards the weekly instalment in respect of the house, and the balance of 1*l.* towards the maintenance of his child Barry.

The defendant did not give the plaintiff notice to produce the slip alleged to be enclosed with the cheque for 3*l.* sent on April 2, 1935, nor was the slip produced in court, but the county court judge admitted secondary evidence as to the contents of the slip.

The county court judge said in his judgment that he accepted the evidence of the defendant. He also believed the plaintiff. He thought the explanation was that she tore up the envelope without noticing the slip, as for some years she had been receiving a weekly cheque from the defendant without any communication whatever. In those circumstances he found that the defendant, the debtor, had appropriated the payment of 3*l.*, as to 2*l.* in respect of the debt under the agreement of March 27, 1933, and as to 1*l.* for the maintenance of his child, Barry. Had there been no slip enclosed he should still have considered that, having regard to the advice received from Mr. Mortimer, the reasonable inference to be drawn was that the defendant appropriated the payment in the manner stated. He also said that he was not satisfied that the oral agreement was put an end to by the decree nisi.

The plaintiff appealed.

F. D. L. McIntyre for the appellant. The county court judge was wrong in holding that it was not necessary that the creditor should know that the debtor was allocating a payment to a particular debt. He found as a fact that the creditor did not know that the debtor was purporting to allocate the payment to a particular debt. The right of a debtor to allocate a payment to a particular debt is limited to this; that if he is purporting to allocate a payment to a particular debt there must be facts which show that the creditor knew that the debtor was purporting to make the allocation. The county court judge wrongly admitted evidence as to the contents of the slip which the husband alleged was sent to the wife in the letter of April 2, 1935, although the wife said that the letter did not contain the alleged slip and that she did not receive it, and although it was not produced and no notice to produce the slip had been given. It is now admitted on behalf of the husband that secondary evidence of the contents of the slip was inadmissible. The position therefore is that it is admitted that the debtor purported to allocate a payment in a way that did not come to the creditor's knowledge, and that therefore the creditor did not know of the purported allocation of the payment to a particular debt, but nevertheless the county court judge has held that the debtor was entitled in that way to allocate the payment to a particular debt. *Parker* v. *Guinness* (1) was cited on behalf of the husband as an authority for the proposition that an intention by a debtor to appropriate a payment to a particular debt is sufficient to amount to an appropriation even though such intention is not communicated to the creditor. But when that case is looked at it is clear that it does not support that proposition and is clearly distinguishable. A debtor cannot appropriate a payment to a particular debt without notice, express or implied, to the creditor. It must be brought to the creditor's notice that the debtor has done an act amounting to an appropriation. The acts of the husband did not amount to an appropriation of the payment of 3*l.* as to 2*l.* to payments in respect of the house and as to the remaining 1*l.* towards the maintenance of the child, Barry. The amount necessary for the maintenance of the child had not been agreed at 1*l.*

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(1) (1910) 27 Times L. R. 129.

a week. The sum of 3*l*. a week was the exact amount due from the husband under the agreement for maintenance.

H. Eaden for the respondent. There was evidence upon which the county court judge could find that there had been an appropriation of the payment of 3*l*. by the defendant. It is not necessary for a debtor to inform his creditor how he appropriates a payment. An intention in the mind of the debtor to appropriate a payment although uncommunicated to the creditor is a sufficient appropriation. It was held in *Parker* v. *Guinness* (1), that where a debtor makes a payment to his creditor, and the inference to be drawn from the circumstances is that the payment is in fact appropriated by the debtor at the time of payment, the fact that he makes no express statement on the subject at the time is immaterial. It is stated in Chitty on Contracts, 18th ed., p. 857, that "it is not essential that there should have been an express declaration by the debtor at the time of the payment, as to the account to which he intended such payment to be applied. His intention may be proved either by his previous or by his subsequent declarations. And even in the absence of any declaration on the subject, it may be collected from other circumstances that the debtor intended, at the time of the payment, to appropriate it to a specific account."

Greer L.J. This is an appeal, the decision of which depends upon certain questions which have arisen between a husband and wife. [His Lordship stated the facts substantially as above set out and continued :] The learned county court judge gave judgment for the defendant upon two grounds. He said that the defendant was entitled to give secondary evidence of the contents of a slip of paper which the defendant said he had enclosed in the envelope with his first payment of 3*l*. to the plaintiff. The plaintiff when cross-examined had stated that there was no such slip in the envelope. The defendant said that he had written on the slip the following words : "This is for the house and Barry." The defendant said that by this slip he had notified the plaintiff that he sent

(1) 27 Times L. R. 129.

the plaintiff the weekly instalments of 2*l.* due under the agreement in respect of the house and 1*l.* per week for the maintenance of the daughter. I am inclined to think that if this document had been duly proved it might be considered not only as an appropriation of a sufficient part of the 3*l.* sent to pay the instalments of 2*l.* due under the agreement in respect of the house, but also as warranting the appropriation of 2*l.* of each payment of 3*l.* subsequently sent by the defendant to the plaintiff towards the weekly instalments due under the agreement with respect to the house. But, unfortunately, there was no evidence which could be considered by the county court judge as to what were the contents of the slip of paper which the defendant said that he had enclosed in the envelope with the first payment of 3*l.* The document was not produced—it was not in Court—and there had been no notice to the plaintiff to produce the document. The learned county court judge was therefore wrong in receiving evidence as to the contents of that document, and in attaching any weight to those contents in his decision of the case. His first ground for giving judgment in favour of the defendant was therefore bad.

The learned county court judge, however, went on to say: "Had there been no slip enclosed, I should still have considered that having regard to the advice received by the defendant from Mr. Mortimer, the reasonable inference to be drawn was that the defendant appropriated the payment in the manner stated." But the fact that the defendant intended to appropriate payments that he made to his wife towards satisfaction of the instalments due from him in respect of the house is not sufficient to justify a finding by the learned judge that there was such an appropriation. In my opinion the view taken by the judge was wrong in law. To constitute appropriation there must be much more than an intention. The appropriation by a debtor must take the form of a communication, express or implied, of his intention to the creditor so that the creditor may know that his right of appropriation as creditor cannot arise. In the absence of communication to the creditor—namely, the wife of the debtor—of the debtor's intention to appropriate a portion of the 3*l.* which he sent to her each week, there was no evidence at all of an appropriation. The amount of the weekly payments made by the defendant was the exact amount due for the maintenance of the defendant's wife and child under the separation agreement, and was not the exact amount of the sum due each week under the agreement in respect of the house. The learned judge was, therefore, wrong in law on the second ground taken by him.

There was no evidence which entitled the learned county court judge to give judgment for the plaintiff. He said that he believed the plaintiff: he accepted the evidence of the wife, although she said that she had not received the slip of paper. He also accepted the evidence of the defendant. That was most unsatisfactory, for the evidence they had given was contradictory. Had we been unable to give judgment for the plaintiff we should have had to send the case back for a new trial. But we are satisfied that the learned county court judge ought to have given judgment for the plaintiff. Accordingly the appeal will be allowed with costs and judgment entered for the plaintiff for 92*l.*

GREENE L.J. I agree. It was not contended before us by Mr. Eaden that the admission by the county court judge of secondary evidence of the contents of the slip of paper alleged to have been enclosed in the envelope containing the 3*l.* could be supported. That being so, there was a payment of 3*l.* without any indication as to the appropriation of that sum to the instalment due with regard to the house. It is true that a debtor who owes two debts to his creditor is entitled to appropriate a payment which he makes to his creditor to one debt rather than to the other. When, however, he does not notify the creditor of his intention, and when the circumstances are such that the creditor receives the payment merely in satisfaction of the debts and the payment is not more appropriate to the payment of the one debt than to that of the other the creditor is entitled to make the appropriation. When it is said that there need not be an express appropriation of a payment, but that the appropriation can be inferred, that does not mean that appropriation of a payment can be inferred from some undisclosed intention in the mind of the debtor. It is to be inferred from the circumstances of the case as known to both parties. Any other view might lead to injustice, as the creditor's right to appropriate a payment would be defeated. When the matter is examined upon principle it will be found that an undisclosed intention in the mind of the debtor is not sufficient to support an appropriation. If authority is needed for that proposition it can be found in the judgment of Lush J. in *Parker* v. *Guinness* (1), where he said: " What is to be considered is this. Is the true inference to be drawn from all the circumstances of the case that the debtor paid the moneys generally on account, leaving the creditor to apply them as he thought fit, or is the true inference that he paid them on account of special portions of the debt for the purpose and with a view to wipe these out of the account? His undisclosed intention so to do would, of course, not benefit him. It is what he did in fact, and not what he meant to do that is to be regarded." A debtor's undisclosed intention to appropriate a payment to one of two debts owed by him to a creditor cannot benefit him. In my opinion the appeal must be allowed.

TALBOT J. I am of the same opinion. I will only add that *Parker* v. *Guinness* (2), seems to me to afford an excellent illustration of a case where appropriation on the part of a debtor may be inferred from the circumstances of the case, although the debtor made no express statement on the subject at the time. There were three actions which were consolidated: two of them against the debtor, and a third against the debtor and his surety, in which the creditor claimed 12,000*l.* odd for principal and interest on certain promissory notes. The debtor in an affidavit, sworn in support of an application for leave to defend, stated in effect that he owed 4474*l.* on all the notes, and claimed to have the whole of the sums charged for interest inquired into. The Master made an order that on the sum of 4474*l.* being paid, the debtor should have leave to defend as to the residue of the claim. The debtor paid the 4474*l.* and, as the headnote states, it was held that the true inference was that the 4474*l.* was appropriated by the debtor to the principal sum owing on all the notes, including those on which he was jointly sued with the surety.

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(1) 27 Times L. R. 129, 130.

(2) Ibid. 129.

Appeal allowed.
Judgment for plaintiff.

Solicitors for appellant: *Lawrence & Mavro.*
Solicitors for respondent: *Thomas Coates & Co., Birmingham.*

R. F. S.

C. A.
1936
April 27, 28.

DE LA RUE *v.* HERNU, PERON & STOCKWELL, LIMITED.

DE LA RUE (CLAIMANT).

[1936. D. 110.]

Husband and wife—Interpleader—Dispute as to ownership of property—Property stored by wife—Action in detinue by husband against warehousemen—Right of warehousemen to interplead—Order directing issue to be tried—Husband to be plaintiff and wife defendant—Jurisdiction to make order—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 17—*R. S. C., Order* LVII., *r.* 7.

A wife deposited certain furniture and other goods with warehousemen for safe storage. Her husband claimed that the furniture and other goods were his property, and issued a writ in detinue against the warehousemen claiming the delivery up of the goods. The wife also claimed the goods as being her property. The warehousemen disclaimed any interest in the goods except for storage charges, and took out an interpleader summons in the action, making the wife the claimant. An order was made by a Master directing the trial of an issue in the King's Bench Division to determine whether the goods were the property of the husband or the wife, and directing that in that issue the husband was to be the plaintiff and the wife was to be the defendant. The judge in Chambers affirmed the order. Upon an appeal by the wife on the ground that such an order could not be made as between a husband and a wife:—

C. A.
1936

DE LA RUE
v.
HERNU,
PERON &
STOCKWELL,
LD.

Held, that the interpleader issue which was directed was not an action by the husband against the wife but a proceeding in the action by the husband against the warehousemen, and that the order for interpleader was necessary in order to give relief to the warehousemen, who had two claimants making claims against them in respect of the property, and that there was jurisdiction under Order LVII., r. 7, to make the order directing an interpleader issue to be tried, and that the husband was properly directed to be in the position of the plaintiff in the issue, and the wife in the position of the defendant, because the deposit of the property with the warehousemen had been made by the wife, and the husband had to make out his case.

APPEAL from a decision of du Parcq J. in Chambers.

Mrs. De La Rue deposited certain furniture, household linen and silver with Hernu, Peron & Stockwell, Ld., warehouse owners, for safe storage. Her husband claimed that the furniture, linen, and silver were his property, and on January 17, 1936, issued a writ in detinue against Hernu, Peron & Stockwell, Ld., claiming the delivery up of the furniture, household linen, and silver specified in a list sent to the defendants. On January 22, 1936, the husband obtained an order for an interim injunction restraining Hernu, Peron & Stockwell, Ld., for one month from parting with the possession of the goods handed to them by Mrs. De La Rue.

Hernu, Peron & Stockwell, Ld., took out an interpleader summons in the action, in which Mrs. De La Rue was made claimant.

The secretary of Hernu, Peron & Stockwell, Ld., in an affidavit said that Hernu, Peron & Stockwell, Ld., disclaimed any interest in the goods which had been deposited with them by Mrs. De La Rue other than for storage charges and insurance premiums. He stated that the goods were also claimed by Mrs. De La Rue, who threatened to commence proceedings for an injunction restraining them from delivering up the furniture and effects to Mr. De La Rue.

On February 13, 1936, an order was made by Master Baker ordering that all further proceedings in the action by Mr. De La Rue against Hernu, Peron & Stockwell, Ld., be stayed, and that no action be brought by Mr. De La Rue or by Mrs. De La Rue against Hernu, Peron & Stockwell, Ld., to recover

C. A.
1936

DE LA RUE
v.
HERNU,
PERON &
STOCKWELL,
LD.

the furniture and effects; and that Mr. De La Rue and Mrs. De La Rue should proceed to the trial of an issue in the King's Bench Division to inquire whether the furniture and effects for which the action was brought were the property of the claimant Mrs. De La Rue as against her husband. The Master further ordered that in that issue the husband was to be the plaintiff and the wife (the claimant) was to be the defendant, and that the issue was to be tried before a Master of the King's Bench Division.

The wife (the claimant) appealed against the order of the Master to the judge in Chambers, who dismissed the appeal but gave her leave to appeal.

The wife appealed. The appeal was heard on April 27, 28, 1936.

Morle for the wife. There is no jurisdiction to make a husband plaintiff in an interpleader issue against his wife who is made defendant in the issue. Before the Married Women's Property Act, 1870, no husband or wife could sue each other at law, but in equity a wife could sue the husband in respect of her separate property by her next friend, but a husband could not sue his wife in equity in respect of property, because by so doing he admitted that the property in question was his wife's separate property. Therefore, there was no machinery before the Act of 1870 by which disputes between husband and wife as to who was entitled to property could be decided in their own names. Sect. 9 of the Act of 1870 provided that questions as to the ownership of property were to be decided by originating summons and s. 11 provided that a married woman could maintain an action in her own name in respect of her separate property, but there was no converse provision entitling a husband to sue his wife. By s. 12 of the Married Women's Property Act, 1882, s. 11 of the Act of 1870 was extended to enable a wife to sue her husband in tort for the protection of her separate property; but with that exception a husband or wife is not entitled to sue the other for a tort. Sect. 17 of the Act of 1882 provides that questions between a husband and wife as to property are to be decided in a summary way. It is well settled that a husband cannot sue his wife in detinue. The only available procedure open to the husband in the present case is that provided by s. 17 of the Act of 1882. That section has not been impliedly repealed by s. 1 of the Law Reform (Married Women and Tort Feasors) Act, 1935 (25 & 26 Geo. 5, c. 30), inasmuch as s. 17 is a special provision dealing with a particular subject-matter; moreover s. 17 is not among the sections of the Act of 1882 that have been expressly repealed.

Rodger Winn for the husband. There was jurisdiction to make the order directing that an issue should be tried as between the husband and wife as to the ownership of this property. The warehousemen had a right to have the interpleader issue, and their right to relief was not complete until the issue was directed. It was just and proper that the relief should be granted, and therefore the judge ought to grant relief by way of interpleader: *Ex parte Mersey Docks & Harbour Board.* (1) An interpleader issue is not an action, but a proceeding in an action: see *Hamlyn* v. *Betteley.* (2) The point that a husband cannot sue his wife only applies to an action and not to an interpleader issue, which is merely a proceeding in the original action. The procedure provided by s. 17 of the Act of 1882 is not an exclusive procedure. It was held in *Larner* v. *Larner* (3) that an action would lie in detinue against a husband at the suit of the wife for the return of her personal property. The only limitation is that husband cannot sue his wife for a tort: *Webster* v. *Webster.* (4) Under the Law Reform (Married Women and Tort Feasors) Act, 1935, a married woman is capable of suing and being sued either in contract or in tort in all respects as if she were a feme sole.

GREER L.J. In this case Mrs. De La Rue deposited certain furniture with a firm called Hernu, Peron & Stockwell, Ld., warehouse owners, and her husband, Mr. De La Rue, issued a

(1) [1899] 1 Q. B. 546, 551.
(2) (1880) 6 Q. B. D. 63, 66.
(3) [1905] 2 K. B. 539.
(4) [1916] 1 K. B. 714, 717.

writ against the warehousemen alleging that the property was his, and claiming that the property should be delivered up to him. Undoubtedly he was entitled at common law, and apart from the statute, to bring that action, and to continue it to a conclusion ; and if he could have established his title to the goods he would then have been, apart from the interpleader proceedings, entitled to a judgment against the warehousemen. In the same way, as the law now is, Mrs. De La Rue could also have brought an action against the warehousemen, and either had judgment in her favour or judgment given against her.

There was a time when a person in the position of a warehouseman had no means of obtaining relief from that difficult position in which he was placed by two claims made against him by different persons, and having to decide for himself, without adequate information or means of obtaining it, to which of them he should account for the goods, or, it might be, the money in his possession. It was considered by the Legislature that that was putting a person in the position of the defendants in this action, Messrs. Hernu, Peron & Stockwell, in a difficult position, and that it was unjust that they should be without some form of relief ; accordingly relief was given by statute to a defendant so sued, or threatened with claims, by means of interpleader proceedings.

The whole object of those proceedings was for the purpose of enabling the warehouseman, or a person in the position of a stakeholder, to obtain relief, and get a decision as to which of the two claimants he had to account to for the goods or money that he held ; and every part of the interpleader proceedings was a part of proceedings intended for the benefit of the warehouseman, the defendant in the action, who had rival claims made against him. It would have been leaving the warehouseman in an unfortunate position if the interpleader rules, or the Interpleader Act, 1831, had not provided for a decision which would enable the defendant in the action, or the person against whom claims were threatened, to know to whom he was to account ; and I think Mr. Winn is right in saying that the order on the interpleader issue in the form in which it was made in this case is not an action by the husband against his wife, but a proceeding in the action against the warehousemen. The authority for that proposition is the case of *Hamlyn* v. *Betteley* (1), which was cited by Mr. Winn.

Now if that is the object of the statute and the rules, it seems to me the Court does not have to inquire whether one of the claimants is a person who could or could not bring an action for tort against the other claimant. All the Court has to determine is whether or not it is necessary, for the purpose of assisting, by the means of interpleader, the defendant in the action, to make an order which will enable him to know to whom he has to account. That is provided for by rules which have been made under the Judicature Act, 1875, and now under the Judicature (Consolidation) Act, 1925, and it is not suggested that those rules, or any of them, are ultra vires.

The most important of them for the purpose of deciding this case seems to me to be r. 7 of Order LVII., which says: "If the claimants appear in pursuance of the summons, the Court or a judge may order that any claimant be made a defendant in an action already commenced in respect of the subject matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant."

Now, how does the Court determine whether two people are claimants? It does not do so by considering whether the one can claim against the other, but by considering whether they are making claims against the defendants in the action; and undoubtedly in the present case the husband, Mr. De La Rue, was making a claim which he wanted to enforce by an action against the warehousemen, the defendants. The wife, although she had not issued a writ, had put forward a claim against the warehousemen. There were, therefore, before the Master when he decided this matter two claimants, one who had actually issued a writ, and the other who had not issued a

(1) 6 Q. B. D. 63, 66.

C. A.
1936

De La Rue v. Hernu, Peron & Stockwell, Ld.

Greer L.J.

writ but had put forward a claim; and it, therefore, seems to me quite clear that there was jurisdiction to make an order under r. 7 of Order LVII., and to decide that an issue should be directed, and also to say which of the two claimants should be, not a plaintiff in the technical sense of the word, because it is not an action, but in the position of a plaintiff; that is to say, who shall be the claimant who has to make out his case against the other. Quite properly the learned Master decided that the claimant ought to be the husband, because the deposit with the warehousemen had been made by the wife, and she was in the position of a person in possession, having nine-tenths of the law. The other tenth appeared to enable the husband to make out his claim. That I think is quite sufficient to dispose of this case.

A good deal has been said, and well said, by Mr. Morle, about the Married Women's Property Acts, and he has suggested that because by reason of s. 12 of the Married Women's Property Act, 1882, and the provisions of the Act of 1935, which keeps alive s. 12 of the Act of 1882, an order cannot be made in this case as between a husband and a wife, because that would be an order equivalent to an action by the husband against the wife for a tort. Now I think that is entirely wrong, for this reason: that an interpleader order of this kind, an issue directed under the rules, is not an action for tort brought by the husband against the wife; it is a method provided by the law for the relief of a defendant when two claimants are making claims against him. For these reasons, notwithstanding the vigorous and interesting argument we have listened to from Mr. Morle, this appeal is dismissed with costs.

Greene L.J. I agree. The argument for the appellant in this case is, in my judgment, founded upon what is really a misconception as to the true nature of interpleader proceedings. Interpleader proceedings originated in Courts of equity, and the appropriate procedure where a person found himself harassed by claims made on behalf of two or more persons was by way of a Bill of Interpleader. It is interesting to observe what the nature of that proceeding was. I read a passage from the Fourth Edition of Daniell's Chancery Practice, vol. ii., p. 1418, published in 1867, because it is from this practice in equity that the whole modern law of interpleader is ultimately derived. The learned author says this: "Where two or more persons claim the same thing, by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a Bill of Interpleader against them." Then he says on p. 1419: "the sole ground on which the jurisdiction of the Court, in this case, is supported, is the danger of injury to the plaintiff"—that is the person who exhibits the bill—"from the doubtful title of the defendants." Now, it is to be observed that under the old equitable procedure, the person desiring to interplead exhibits a Bill of Interpleader, to which he makes both claimants defendants; and the way the matter then proceeded under the old equitable procedure, is set out on p. 1422 in these words: "If, at the hearing, the question between the defendants is ripe for decision, the Court will make a decree. If that is not the case, proper inquiries, or trials of questions of fact, either before the Court itself or a Court of common law, will be directed, in order to bring the matter to a determination." Accordingly, under that practice, there was not necessarily any question of the two claimants suing one another either upon a real or a feigned issue. The plaintiff was the person against whom the claim was made; he came to a Court of equity to obtain relief, and to meet the two claimants themselves; and the matter was then decided, either summarily by the Court, or by the usual machinery of directing inquiries, with a consequential order on further consideration, or by remitting the matter to the Courts of law. I venture to think that it could not be suggested that two defendants to a Bill of Interpleader of that kind could be said to be engaged in an action of tort against one another. They were not.

Before the Interpleader Act, 1831, where the person in possession of the goods was sued at law his only remedy, apparently, was to exhibit a Bill of Interpleader in a Court of equity, asking, among other things, that the action at law might be stayed pending the decision of the matters raised by the Bill; and the Courts of equity had jurisdiction to stay actions at law in those circumstances.

The next step was the passing of the Interpleader Act, 1831, and it is rather important to see exactly what it says. It says this: "Whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a Bill of Interpleader, which is attended with expense and delay; for remedy thereof be it enacted"; and then the Act proceeds to make provision for the determination of interpleader issues in Courts of law, one of the pieces of machinery for the decision of those matters being the directing of a trial on one or more feigned issues.

Now, in substance, this appears to be a mere matter of machinery. Both claimants were defendants to the Bill, and under the Interpleader Act, 1831, the machinery could be used of directing a feigned issue, and that is the type of machinery which is embodied in the rules relating to interpleader contained in Order LVII.; but it is machinery and nothing more, in my opinion.

What, in substance, all along, both under the old equitable procedure and under the modern procedure, is being decided, is claims by two claimants against the person interpleading. What really happens is, that whereas there are two claimants who are harassing a person desirous of interpleading that person is by the interpleader proceedings calling upon the claimants to come out into the open and formulate their claims against him.

In substance, when an interpleader issue is tried, two actions against the person interpleading are being dealt with. Interpleader proceedings are the method of compelling the parties—either one, or both, or neither of whom may have actually issued a writ—to prosecute their claims. As it is the essence of interpleader proceedings that the person who has interpleaded has no title himself he naturally drops out of the suit. But in effect the entire matter is tried out in the presence of all the parties concerned, and the real claimants are compelled to put forward their claims and have them adjudicated upon. The reason for that is not their own benefit, it is for the relief of the person interpleading.

When it is once appreciated that that is the true nature and history of interpleader proceedings, I take the view that it is quite wrong to treat an issue directed under the Interpleader Rules as though it were an action of tort. It is a method to enable the Court to decide the claims between two persons present at the proceedings, and to decide those claims so that the person interpleading will get the relief to which he is entitled.

That being so, I can see nothing in the Married Women's Property Acts which would exclude the operation of the Interpleader Rules, where the disputed property is the property of husband or wife. Now, before the right which was given to the wife by the Married Women's Property Acts, the way the married woman could hold her property was either to her separate use, with the intervention of a trustee; or, where the property was given to her for her separate use without the intervention of a trustee, equity would compel the husband to act as trustee for the wife.

Accordingly, before the statutory separate property came into existence, the only way in which a dispute as to the property could arise, where the wife was claiming that the property was hers in equity, was either where trustees (where there were trustees) were claiming against the husband, or the husband against the trustees; or where the husband held property in such circumstances that equity would compel him to act as trustee for the wife, and was refusing to recognize her right, in which case the proper procedure would be by proceedings in equity.

Once the statutory separate property was brought into existence under the Married Women's Property Acts, it dispensed with the necessity of a trustee. It seems to me that a married woman, in regard to her property, is put in precisely the same position in regard to claims in interpleader as any other person, and I can see no reason either in the language of the Rules or in the language of the Married Women's Property Acts for making an exception. The summary procedure under s. 17 of the Married Women's Property Act, 1882, is not, in my judgment, the only way to decide these matters between husband and wife, but is a convenient method which can be used in appropriate circumstances. I am quite unable to take the view that it has the effect, impliedly, of writing into the Rules relating to interpleader some exception in the case of husband and wife. Indeed when the matter is examined, and the Rules are examined, it appears that the argument presented to us on behalf of the appellant really involves this: that the Interpleader Rules do not apply at all in a case where the husband is making a claim against property in the hands of a third person which is also claimed by the wife. I say the argument really leads to this, that the Rules would not apply, because Mr. Morle, while admitting—and I think he was constrained to admit—that the right of the third person, the warehousemen in this case, to take out a summons calling upon the claimants to appear, under Order LVII., r. 5, remains to him, was unable to explain—to my satisfaction, at any rate—what relief the applicant could obtain on such a summons. Mr. Morle said he could get a stay of proceedings under r. 6. With regard to that I should like to make two observations. I read r. 6, which contains a power to stay proceedings in the action, as meaning this: That as incidental to the interpleader relief, the Court has power to stay proceedings. That indeed was the case with regard to a similar power given by s. 1 of the Interpleader Act, 1831. I construe this rule in the same sense.

There is a further objection to the argument—namely, that a mere stay of proceedings, with nothing more, would not be the granting of interpleader relief at all. The object of interpleader relief is to enable a person who is harassed by claims made by two or more persons, to be quieted. If the passage I have already read from Daniell's Chancery Practice as to the origin and the nature of interpleader is referred to, that was the object of it. If he is in danger owing to the doubtful title, he is entitled to be quieted. And that is what the Interpleader Rules are for. A mere stay of the proceedings would not produce this result.

It appears to me that if Mr. Morle is right in saying that the only power which the Court has in the present case is to stay proceedings, leaving it to the husband to make application under s. 17 of the Married Women's Property Act, 1882, the Court would not be granting any interpleader relief at all.

For these reasons I think that the appeal fails.

TALBOT J. I am of the same opinion, and certainly do not wish to add anything of substance to the judgments which have been delivered.

I thought myself at a somewhat early stage of the very interesting argument to which we have listened, that the grounds of the appeal were of the most technical character; and I think that now, at any rate, it has been established by the careful review of the history of interpleader, and the purposes of it, that it is not merely a technical argument, but it is an argument which has no good ground in technicality.

There is here no violation by any one of the provisions of s. 12 of the Act of 1882, on which the whole thing rests—namely, that no husband or wife shall be entitled to sue the other for tort. The husband in this case does not sue his wife for a tort, and never has; and that is entirely without expressing any opinion as to the strict technical nature of an action in detinue.

In truth whether you look at the older authorities or the recent authorities, the form of an interpleader issue is quite immaterial. As Parke B. said in *Carne* v. *Brice* (1) it might be—and indeed in that particular case ought to have been—in the form in which it entirely ignores any position as between an imaginary plaintiff and an imaginary defendant, or a real plaintiff and a real defendant. The form with which he would have been satisfied in that case would have been simply this: Whether the goods in question there were the property of the trustees of the wife's marriage settlement or not. As he says, that was the real question, and it was that, and only that, with which the Court was concerned. He makes that more clear, if possible, by saying later that the issue is only a proceeding directed for the purpose of informing the conscience of the Court. And I observe that in the last edition of the compilation known as The Laws of England, vol. 18, p. 630, it is stated in plain terms that "the form of the issue is immaterial and is merely directed to the purpose of informing the Court."

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(1) (1840) 7 M. & W. 183, 185.

I agree therefore that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Sutton, Ommanney & Oliver.*
Solicitors for respondent: *Gisborne & Co.*

R. F. S.

1936
March 13, 16.

VAN DUSEN *v.* KRITZ.

[1935. V. No. 938.]

Copyright — Infringement — Artist's drawings — Offending drawings acquired bona fide without knowledge of infringement—Exhibition in public by way of trade—Posters and showcards—Complaint by owner of copyright—Reasonable time to investigate—Time for physical removal of posters—Writ issued prematurely—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 2, *sub-s.* 2.

By s. 2, sub-s. 2, of the Copyright Act, 1911: "Copyright in a work shall also be deemed to be infringed by any person who . . . . (*c*) by way of trade exhibits in public . . . . any work which to his knowledge infringes copyright. . . . ."

Where a defendant acquires the work, in the first instance, in good faith and without any knowledge that it infringes copyright, he is entitled to a reasonable time and opportunity to find out whether or not it does infringe copyright. No offence is committed against the sub-section unless the infringement is deliberate, in the sense of deliberately continuing to use or exhibit the work when the exhibitor knows that it infringes copyright. A mere complaint by the owner of the copyright, together with copies of the work said to be infringed, will not suffice to impute to a defendant " knowledge " within the meaning of the sub-section.

The plaintiff was the owner of copyright in fashion illustrations for men's clothes. In 1935, the defendant, a tailor, caused to be exhibited in his shop, show-cards displaying a man in morning-dress. He also put up posters at railway stations displaying a man in evening-dress. On October 16 the plaintiff wrote to the defendant complaining that the posters and show-cards infringed copyright. On October 18 the plaintiff supplied the defendant's solicitor with copies of the work said to be infringed. The defendant at once removed the show-cards from his premises, and took steps to find out whether or not he was infringing the plaintiff's copyright. On October 23 he wrote to the plaintiff saying that although he did not admit any infringement of the plaintiff's copyright, he thought it best to remove any cause of complaint by discontinuing the exhibition. On the same day the plaintiff issued a writ claiming from the defendant damages for infringement of copyright. The judge found on the facts that there had been no unreasonable delay on the defendant's part in investigating the plaintiff's complaint:—

Held, that no " knowledge " within the meaning of the sub-section could be imputed to the defendant until he had had a reasonable time and opportunity to find out whether he was exhibiting by way of trade any work which infringed copyright. On the evidence, the time when the defendant acquired that knowledge was October 23. Therefore, at the time the writ was issued, there was no exhibition by way of trade of any work which, to the defendant's knowledge, infringed the plaintiff's copyright. The writ was issued prematurely and the action failed.

ACTION tried by Goddard J. without a jury.

The plaintiff was a commercial artist of standing in his profession. He was the owner of the copyright in fashion illustrations in a brochure entitled " For men." He designed pictures illustrating fashions in men's clothes. The figures were generally men in well-cut clothes, shown in a pose designed to show off the particular beauty of the tailor's shoulder cutting and sleeve cutting. These fashion plates were designed by the plaintiff each year, and were supplied to tailors in all parts of London and all over England, for distribution or exhibition to their customers, indicating the class of garment supplied by the tailor.

The defendant was a tailor, carrying on business in the Commercial Road, Aldgate, E. The business consisted of letting out on hire evening-dress and morning-dress garments to be worn at various functions. In 1935 the defendant was approached by a ticket writer named Goorman, who offered him a drawing of a man in evening-dress for 5*s*. A poster was afterwards made of this drawing. Later, Goorman offered the defendant three show-cards, which the defendant bought for 3*s*. 6*d*. each. The original of one of these show-cards displayed a man in morning-dress standing near a streamlined motor-car. The defendant caused these show-cards to be exhibited in his shop. He also caused posters displaying a man in evening-dress to be exhibited at various railway stations.

On October 16, 1935, the plaintiff's solicitor wrote to the defendant complaining that the posters and show-cards infringed his (the plaintiff's) copyright. The defendant at once consulted his solicitors, and removed the show-cards from his premises. On October 18, 1935, the plaintiff's solicitor sent to the defendant's solicitors copies of the fashion plates which the plaintiff had drawn, and claimed that those were the drawings which Goorman's productions infringed.

On October 23 the defendant's solicitors wrote to the plaintiff's solicitor, saying that although they did not accept the contention that the poster complained of infringed the plaintiff's copyright, they had thought it best to advise the defendant to remove any cause of complaint by withdrawing the posters which were exhibited, and to undertake that no more should be issued. They added that the defendant was also prepared to withdraw the show-cards exhibited on his premises.

That letter was delivered before 12 o'clock on October 23 to the plaintiff's solicitor. On the same day the plaintiff issued the writ claiming an injunction to restrain the defendant from infringing the plaintiff's copyright in the fashion illustrations; delivery up of all infringing copies; an account of all moneys received by the defendant in respect of the infringing copies; damages, and other relief. The defendant said that, while denying that the exhibition of posters and show-cards by him afforded the plaintiff any cause of complaint, he nevertheless, with a view to a speedy settlement of the dispute, took steps, immediately on receipt of the plaintiff's solicitor's letter of October 16, to remove the pictures and duly notified the plaintiff's solicitor accordingly on October 23. He denied that the plaintiff had suffered any damage.

E. Ryder Richardson for the plaintiff. The evidence shows that there has been copying of the plaintiff's drawings. The plaintiff's copyright was infringed. The defendant continued to exhibit after he had knowledge that copyright was being infringed. The plaintiff's solicitor wrote to him on October 16 complaining of the infringement. On October 18 he was supplied with copies of the plaintiff's drawings. He must have known then that he was infringing the copyright. The defendant had no reasonable ground for delaying matters until October 23. He should have taken steps at once to remove the offending posters. He had plenty of time in which to do that before October 23, when the writ was issued. He continued to exhibit by way of trade after he had acquired knowledge that the work infringed the plaintiff's copyright.

Kenneth R. Swan K.C. for the defendant. When the defendant acquired the drawings in the first instance, he acquired them in good faith and had no knowledge that they infringed any copyright. The complaint was made on October 16. He was entitled to have a reasonable time and opportunity after that date to find out whether the drawings infringed the plaintiff's copyright or not. He did not delay matters unreasonably. The defendant is not liable in this action unless he continued the exhibition with knowledge, and in the circumstances, knowledge, within the meaning of s. 2, sub-s. 2, of the Copyright Act, 1911, cannot fairly be imputed to him before the day the writ was issued. (1)

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(1) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 2, sub-s. 2: "Copyright in a work shall also be deemed to be infringed by any person who . . . . (*c*) by way of trade exhibits in public . . . . any work which to his knowledge infringes copyright. . . . ."

1936

VAN DUSEN
v.
KRITZ.

GODDARD J. [having stated the facts, said:] I am quite satisfied that the defendant, when he bought these drawings and when he gave the order for the poster to be prepared and to be exhibited, had no idea whatever that this was a copy of anybody's work or that it infringed anybody's copyright. There is not the least evidence that he did, and I see no reason whatever to hold that he had any knowledge on the subject at all. If the plaintiff thought that his copyright had been infringed and a wrong had been done, he was perfectly at liberty to issue a writ; but I have to decide whether at the time the writ was issued there had been an infringement by the defendant. Mr. Ryder Richardson's argument, which he has addressed to me very strenuously on behalf of the plaintiff, is this: He said that on October 18 the plaintiff supplied the defendant with copies of his drawings, and therefore the defendant must have known at once that he was infringing the copyright. There was no excuse for the defendant to delay matters until October 23, when the writ was issued. The defendant ought to have taken steps before that.

It seems to me that that argument is not sound. The statute says that it is an offence to exhibit by way of trade any work which to the exhibitor's knowledge infringes copyright. The question therefore is: When did the defendant have knowledge that this drawing infringed the plaintiff's copyright? I have no doubt that the defendant is a very good judge of tailoring; I have no doubt that he is a very good judge of the class of clothes which the people in his neighbourhood, to whom he lets out these garments, require for attending functions; but I think anybody who has seen the defendant would come to the conclusion that he probably has no knowledge of artistic productions in the shape of drawings. I have no reason to impute to his solicitors any particular artistic knowledge.

After having had the great assistance which I have derived from Mr. Ryder Richardson's opening in this case, in which he pointed out to me the various matters from which I ought to draw the inference that there was copying here, and after having had the advantage of his exposition on the subject, and after hearing the evidence, I think I am well justified in coming to the conclusion that there must have been a copying of the plaintiff's drawing, in the sense that the artist who prepared the drawings which the defendant bought had seen, and had been inspired by, the plaintiff's drawing. One artist is often inspired by another. I dare say Sir Joshua Reynolds and Romney and various other great masters have inspired other people. But it is one thing to say that he has been inspired, and another thing to say that he has copied.

I think when a person who was not skilled in matters of art looked at these drawings in the first instance, the differences between them were so marked that he would want to have various matters explained to him. I do not think it would have occurred to me, in looking at the photograph of the gentleman in morning-dress, that it was a copy of the plaintiff's work. Indeed, it is only suggested now that it is the pose of the two figures which is the same.

When all this is pointed out to one, I think the matter becomes clear ; but before it could be said that the defendant had knowledge that what he was exhibiting was an infringement of copyright, it seems to me that he was entitled to something more than a mere statement by the plaintiff that it was an infringement and the mere sending by the plaintiff of copies of the work which is alleged to be infringed.

I do not think that the defendant took an unreasonable time to make up his mind whether or not there was an infringement of the plaintiff's copyright. By October 23 he had come to a reasonable state of mind, due no doubt to the very excellent advice he had received from his solicitors. He said, in effect : " Infringement or no infringement, whether it is or it is not, I am going to stop this thing at once." At the moment the defendant heard about this matter, he removed the show-card from his shop window. On October 23 he wrote to the plaintiff's solicitor saying that he had made up his mind to remove any cause of complaint by having all the posters taken down. The next thing was the writ.

Was there a cause of action at that time ? The cause of

1936

VAN DUSEN
v.
KRITZ.

Goddard J.

action consists in exhibiting by way of trade any work which to the defendant's knowledge infringes copyright. He certainly did not exhibit any work after October 23, in the sense of putting fresh posters on exhibition. Between October 18, when the drawings were sent, and October 23, when the writ was issued, the exhibition in the sense of the posters remaining up on the hoardings at various stations continued, and therefore there was a continuing exhibition between those dates. I do not think that I ought to hold that there was an exhibition of those posters with knowledge that they infringed copyright until the defendant had had a reasonable opportunity of investigating the plaintiff's claim that they infringed copyright. I cannot read the words " any work which to his knowledge infringes copyright " in the same way as " any work which the author gives notice, or claims, infringes copyright." I do not think that the statute means that a person, directly he receives a notice that there is an infringement of copyright, must exhibit at his own risk.

The Act seems to me to aim at a deliberate infringement in the sense of deliberately continuing to use or exhibit a work which the defendant knows infringes a copyright. I think, therefore, that Mr. Swan's argument is right, that a defendant must have a reasonable opportunity of finding out whether the work infringes the copyright or not, if, as I find is the fact in this case, he acquired the drawing, in the first instance, in good faith and without any knowledge that it infringed a copyright.

What may be a reasonable time is always a difficult question ; but I am not disposed to hold in this case that the defendant delayed matters unduly. I think he got to work to make reasonable inquiries and to make up his mind ; and, in so far as it is a question of fact, I find that he did not have knowledge until he had a reasonable opportunity of making inquiries, and that the period from October 16 to October 23 was not an unreasonable time to take to satisfy himself with regard to the genuineness of the plaintiff's complaint. I do not think, therefore, that I ought to hold that the defendant had knowledge of the infringement of copyright until October 23. Then on the morning of that day, having by that time obtained knowledge that the work did infringe copyright, he told the plaintiff's solicitor that he intended to discontinue the exhibition of the posters at once by taking them down.

I think the issue of the writ was premature, because no breach of sub-s. 2 of s. 2 of the Copyright Act, 1911, had then occurred. It seems to me that the only reasonable and sensible construction one can put on the sub-section is that if it comes to a defendant's knowledge that he is exhibiting by way of trade a work in which there is copyright, he will commit an offence if he continues to exhibit; but if he takes immediate steps to prevent exhibition by taking down the offending pictures, he cannot be liable in an action for infringement, merely because it is physically impossible to prevent some period of time elapsing between the moment when the matter comes to his knowledge and the moment when he can get the offending pictures removed from exhibition.

A further point that arose was this. So far as the morning-dress card was concerned, it seems to me quite obvious that there can be no complaint at all. But so far as the posters were concerned, it is obvious to my mind that these could have been covered up quicker than they were covered up or taken down. It would not have made very much difference, a difference of perhaps three or four or five days; it would not have made a difference of a week, but it could have been done quicker than it was. At first, therefore, I was inclined to think that to some extent the defendant must be held to have continued the exhibition longer than was necessary for the purpose of getting the posters down or covered up; but Mr. Swan has satisfied me that unless the defendant continued the exhibition with knowledge before October 23, he is not liable in this action. Although he had notice of the plaintiff's claim, I do not think it would be fair to impute to him knowledge that this was an infringement before about October 22, or 23. I think that the action is premature, in the sense that the writ was issued too soon. It was issued on October 23,

1936

VAN DUSEN
v.
KRITZ.

Goddard J.

which was the time when, as I find, the defendant acquired the knowledge that he was infringing copyright. Therefore, I do not find that, at the time the writ was issued, there was any exhibition by way of trade with knowledge that the posters infringed the plaintiff's copyright.

If I am wrong in this matter, and I have no doubt it may be tested further, it is right that I should fix the damages, so as to avoid a new trial or a further inquiry. The damages must in any case be very small. The show-cards were removed from the defendant's shop at once. The evening-dress posters have all been destroyed. No witness has been called to say that the plaintiff's trade customers thought he had departed from his usual practice of only designing for the high-class trade, or that his reputation has suffered, or that any of his customers would have thought that this somewhat crude representation was the work of the plaintiff.

In the circumstances I think the damages, if any, approach the nominal. Even if I had to fix the damages down to the time when the last of these posters disappeared the utmost damages I would have given would be the sum of 10*l.* I fix that sum in case another Court takes a different view of the case.

I have come to the conclusion that the writ was issued prematurely, for the reasons which I have given in this judgment. The result is that there will be judgment for the defendant with costs.

Judgment for defendant.

Solicitor for the plaintiff: *J. Thompson Halsall.*

Solicitors for the defendant: *Herbert Oppenheimer, Nathan, Vandyk & Mackay.*

T. W. M.

TRINIDAD PETROLEUM DEVELOPMENT COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

1936
May 15, 18.

Revenue—Income tax—Claim to set off profits of one year against losses of former years—Payment of interest under deduction of tax—"Profits or gains brought into charge to tax"—Assessment of payer—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21; *Rules applicable to Cases I. and II. of Sch. D, r.* 6, *sub-ss.* 1, 3—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 33, *sub-s.* 1.

A taxpayer, who has deducted tax when paying a sum representing interest on money, is assessable to tax on that interest under r. 21 of the All Schedules Rules of the Income Tax Act, 1918, notwithstanding that he is entitled, under s. 33 of the Finance Act, 1926, to set off against his profits earned in the year of assessment losses, exceeding those profits, incurred by him in previous years.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on October 31, 1935, the Trinidad Petroleum Development Company, Ld., of River Plate House, Finsbury Circus, in the City of London (hereinafter called "the company"), appealed against an assessment made upon it under r. 21 of the All Schedules Rules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, for the year 1933–34 in the sum of 46,032*l.* in respect of interest paid out of profits and gains not brought into charge.

For the year 1933–34 the company paid interest under deduction of tax to the British Controlled Oilfields, Ld., as follows:—

	£	*s.*	*d.*
31st July, 1933, on current account . .	11,065	4	6
1st December, 1933, on debentures . .	26,586	3	9
31st December, 1933, on current account .	8,380	12	9
	£46,032	1	0

The profits of the company as computed for purposes of income tax for the year to July 31, 1932, to which date its

1936

TRINIDAD PETROLEUM DEVELOPMENT CO. v. INLAND REVENUE COMMISSIONERS.

accounts in the year previous to 1933-34 had been made up, were		£160,718
Less wear and tear brought forward from previous years	£48,715	
Less wear and tear for 1933–34 . .	90,095	
		90,810
		£69,908

The company had claimed under the Finance Act, 1926, s. 33, sub-s. 1 (1), to carry forward losses of 26,473*l.* and 55,612*l.* attributable to the years 1927-28 and 1928-29 respectively, and to set such losses off against profits on which it might be assessable under Sch. D for subsequent years. The relief thus claimed fell under sub-s. 3 of the same section to be

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(1) Income Tax Act, 1918, All Schedules Rules, r. 19, sub-r. 1: "Where any yearly interest of money . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest . . . . but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest . . . . and the person liable to make such payment . . . . shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. . . . ."

Rule 21: "(1.) Upon payment of any interest of money . . . . charged with tax under Schedule D . . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment. (2.) Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . . and every such amount shall be a debt from him to the Crown and shall be recoverable as such. . . . ."

Finance Act, 1926, s. 33, sub-s. 1: "Where a person has in any trade, profession or vocation carried on by him . . . . sustained a loss . . . . in respect of which relief has not been wholly given under section thirty-four of the Income Tax Act, 1918 . . . . or under Rule 13 of the Rules applicable to Cases I. and II. of Schedule D . . . . or under any other provision of the Income Tax Acts, he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under Schedule D in respect of that trade, profession or vocation for the six following years of assessment; . . . ."

1936

TRINIDAD PETROLEUM DEVELOPMENT CO.
v.
INLAND REVENUE COMMISSIONERS.

given to the extent of 69,908*l.* against the assessment for 1933–34; as follows:—

Assessable profits 1933–34		£69,908
Loss for 1927–28	£26,473	
Loss for 1928–29	55,612	
		82,085
Balance loss (attributable to 1928–29) carried forward		£12,177

On behalf of the company it was contended:—

(1.) That the amount of profits or gains on which the company was assessed under Sch. D for the year 1933–34 was 69,908*l.*;

(2.) That the fact that the company had a right under s. 33 of the Finance Act, 1926, to have losses of previous years deducted from or set off against the amount of the profits on which it was assessed for the year 1933–34 did not prevent such profits from being brought into charge to tax;

(3.) That 69,908*l.* was the amount of the company's profits or gains brought into charge to income tax for the year 1933–34;

(4.) That as the company's profits or gains brought into charge to tax exceeded the amount of the interest paid, such interest was wholly payable out of profits or gains brought into charge and was not assessable under r. 21.

On behalf of the Commissioners of Inland Revenue it was contended:—

(1.) That the interest in question came within r. 21 of the All Schedules Rules of the Income Tax Act, 1918;

(2.) That the profits and gains for 1933–34 against which losses had been set off by virtue of s. 33 of the Finance Act, 1926, were not profits and gains which had been brought into charge to tax for the purposes of r. 19 of those rules;

(3.) That the assessments should be confirmed.

The Commissioners, who heard the appeal, confirmed the assessment appealed against.

Needham K.C. and *J. S. Scrimgeour* for the appellants.

1936

TRINIDAD PETROLEUM DEVELOPMENT CO. *v.* INLAND REVENUE COMMISSIONERS.

The effect of s. 33 of the Act is that the taxpayer has a minus quantity from past years which constitutes a credit in his favour. He can use that as a set-off during the next six years. In so doing the taxpayer has used up the credit, and it is only by having assessable profits during the year of charge that the credit is depleted. A new conception is introduced by s. 33, which is to be contrasted with the "wear and tear" rule (r. 6 of the Rules applicable to Cases I. and II. of Sch. D). (1) By that rule deductions are made from a gross amount before assessment, whereas by s. 33 an assessment is made first and then a set-off is allowed. The amount of the assessment, in this case 69,908*l.*, is the amount of profits and gains brought into charge, and the tax on it is paid by setting off the losses incurred in earlier years. Having paid the tax in that way, r. 19 applies, and the appellants are not liable to pay anything more. When the assessment is arrived at, credit is given for past losses, and that can only be done after the profits and gains have been brought into charge.

[LAWRENCE J. You are saying that profits and gains are exempt if once they are brought into account, which is not the same thing as bringing them into charge.]

By that operation we are being deprived of a valuable negative quantity—namely, our credit which the Act allows us to use in future years. The appellants' taxable income is 69,908*l.*, and they are setting against it the interest paid in that year.

[LAWRENCE J. To speak of taxable income in cases where no tax has been or will be paid is to my mind a contradiction in terms.]

(1) Income Tax Act, 1918, Sch. D, Cases I. and II., r. 6: "(1.) In charging the profits or gains of a trade under this Schedule, such deduction may be allowed as the commissioners . . . . may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on. (3.) Where full effect cannot be given to any such deduction in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the deduction, the deduction . . . . shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year, and deemed to be part of that deduction. . . . ."

That position might arise if tax had been overpaid in an earlier year, and that case is analogous to this one.

[LAWRENCE J. Suppose a case where the losses did not entirely wipe out the profits. You would pay tax on the difference, and that would be the taxable income, although not the same sum as the amount assessed. Here you have paid nothing, and that is your taxable income.]

In ascertaining the profits of any year, you cannot take into account the earlier years. You must first fix the profit, which is thereby brought into charge to tax. After that you deduct the earlier losses. The words of the section are clear and are used in intended contrast to those of the wear and tear rule. [They cited *Attorney-General* v. *Metropolitan Water Board.* (1)]

Sir Terence O'Connor S.-G. and *R. P. Hills* for the Crown. The words " brought into charge " in r. 21 are used in the sense of effectively bringing into charge, meaning that the tax has been, or will be, paid. Tax on interest has to be paid by virtue of Case III. If the appellants are right this is an instance where no tax is paid to the Crown on interest. The appellants are in effect levying a tax on the recipient of the interest for their own benefit and not for that of the Revenue. It would require clear words in the statute to produce such a result, and there are no such words in s. 33 of the Act of 1933.

Tax under Sch. D is paid by the recipient of the income. An exception arises where interest is paid out of profits and gains, and that is dealt with by r. 19. So far as the payer pays out of funds not brought into charge, r. 21 applies. Therefore under r. 19 the taxpayer is recouping himself for tax paid, and under r. 21 he is collecting on behalf of the Crown. As to the wear and tear rule, in such cases the profit does not exist until the deductions for wear and tear have been taken into account. The argument is based on the assumption that the first assessment is necessarily final. [They cited *Sugden* v. *Corporation of Leeds* (2); *Attorney-General* v. *London County Council* (3); and *Luipaards Vlei Estate and Gold Mining Co., Ld.* v. *Commissioners of Inland Revenue.* (4)]

(1) [1928] 1 K. B. 833.
(2) [1914] A. C. 483.
(3) [1907] A. C. 131.
(4) [1930] 1 K. B. 593.

Needham K.C. replied.

LAWRENCE J. This case involves the construction of r. 19 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, and the construction of s. 33 of the Finance Act of 1926, the point being: What is the meaning in r. 19 of the words "payable wholly out of profits or gains brought into charge to tax"?

The appellant company has been assessed under r. 21 in the sum of 46,032*l.* in respect of interest paid to the British Controlled Oilfields, Ld., which it is alleged by the Crown was not paid out of profits or gains brought into charge to tax. The company had made losses in years previous to the year 1933–34 and was entitled to carry forward those losses under s. 33 of the Finance Act, 1926, and thus, although the company made a net profit after allowance for wear and tear in the year 1933–34 of 69,908*l.*, it paid no tax in that year, because it brought forward losses from 1927-28 and 1928-29 of 82,085*l.* which more than absorbed the profit of 69,908*l.*

The argument for the appellant company is that the payment of interest to the British Controlled Oilfields of 46,032*l.* was wholly paid out of profits or gains brought into charge to tax because it was paid out of, or is deemed to have been paid out of, the 69,908*l.* which were assessed for the year 1933–34 before the deduction of the 82,085*l.*, which were deductions for previous losses. The argument, which was very ably and ingeniously presented by Mr. Needham, as I understand it, was this. He says that it is the practice, and that it is in accordance with the Income Tax Acts, that the amount of the net profits or gains should be assessed in each year, and that that was done in this case, and that 69,908*l.* was the resultant figure. He says that in assessing that figure the Revenue Authorities did bring those profits into charge to tax. He relies particularly upon the words of s. 33 of the Finance Act, 1926, and the contrast which he says exists between them and the words of r. 6, sub-s. 3, of Cases I. and II. of Sch. D of the Income Tax Act, 1918, dealing with wear and tear. He says that when dealing with deduction for wear and tear the statute provides in sub-s. 3 of r. 6: "Where full effect cannot be given to any such deduction in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year, and deemed to be part of that deduction." The words in that rule upon which he insists are "for the purpose of making the assessment for the following year." So, he says, the deduction for wear and tear which has to be carried forward has to be carried forward and deducted before the assessment is made, whereas in s. 33 the scheme is that the deduction should be made after the assessment, s. 33 providing that where a person has made a loss in previous years "he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under Schedule D in respect of that trade, profession or vocation for the six following years of assessment." Therefore he says that the Legislature in passing s. 33 must consciously have used words which were designed to have a different effect from the words used in r. 6, sub-s. 3, under the Act of 1918, and that the assessment which is made for the year before relief is given for preceding losses is the only thing that can be looked at for the purpose of seeing whether under r. 19 the annual payment has been made out of profits brought into charge to tax. He says, therefore, that the assessment is the only way in which the profits of the year can be brought into charge to tax.

In my judgment that argument is unsound and conflicts with the authorities to which my attention has been drawn—namely, *Attorney-General* v. *London County Council* (1); *Sugden* v. *Corporation of Leeds* (2); *Attorney-General* v. *Metropolitan Water Board* (3); and *Luipaards Vlei Estate*

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(1) [1907] A. C. 131, 137.
(2) [1914] A. C. 483, 490, 506.
(3) [1928] 1 K. B. 833.

1936

TRINIDAD PETROLEUM DEVELOPMENT CO.
v.
INLAND REVENUE COMMISSIONERS.

Lawrence J.

and Gold Mining Co., Ld. v. *Commissioners of Inland Revenue.* (1) All the learned judges in those cases speak of "profits brought into charge to tax" as being profits which have suffered tax, profits out of which or in respect of which tax has actually been paid, or for which there has been a liability to tax created. Mr. Needham submits that those cases were all decided before s. 33, and that, therefore, the observations made in them ought not to be held in any way to conclude the question; but apart from those cases, I am of opinion that the words of r. 19 are not co-terminous with the word "assessed" in s. 33. They appear to me upon their ordinary interpretation to refer to profits which have actually suffered tax or in respect of which a liability to tax has been created. As I understood him, Mr. Needham agreed that in respect of other forms of relief from income tax there might be relief which, in accordance with the framework of the Income Tax Acts, was allowed after the assessment for the year had been made, and in such circumstances it seems to me it would be impossible to treat the assessment which precedes the relief as settling the amount of the profits brought into charge to tax within the meaning of r. 19. The net figure which creates the taxable income must, in my opinion, be the amount of the profits brought into charge to tax.

For these reasons I am of opinion that the judgment of the Commissioners was right, and the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Elvy Robb & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1930] 1 K. B. 593, 601.

V. R. A.

KENYON *v.* DARWEN COTTON MANUFACTURING COMPANY, LIMITED.

C. A.
1936
Jan. 30, 31;
Feb. 14.

Master and servant—Wages—Deductions—Agreement by servant to take shares in employing company—Payment to be made weekly by deductions from wages—Wages not paid in current coin of Realm—Illegality of contract—Counterclaim for price of shares—Truck Act, 1831 (1 & 2 *Will.* 4, *c.* 37), *ss.* 1, 3, 4, 25*—Truck Amendment Act,* 1887 (50 & 51 *Vict. c.* 46), *s.* 2.

A company was compelled to close its mills owing to economic depression. As a result of a joint consultation between the company and their employees a scheme was devised whereby the operatives might find capital to finance the company by subscribing for shares. It was part of the scheme that the shares should be paid for by small instalments paid weekly out of the wages that the operatives might receive. Shortly after the plaintiff was employed at a mill belonging to the company she signed two documents, the one requesting the allotment to her of a certain number of shares in the company, and the other agreeing that the shares should be paid for out of the wages earned with a request that the instalments should be deducted from the wages each week. At first the practice was to hand to every operative, including the plaintiff, loose coins equivalent to his or her wages, after all deductions had been made, together with an envelope containing coins equivalent to the share subscription then due from him or her, and for the operative forthwith to hand back that envelope with its contents to a clerk, who was sitting beside the clerk who was paying out wages, in exchange for a receipt. Later the use of the envelope was discontinued, and all that was handed to the operative was the net amount of his wages after all deductions, including the deductions for shares, had been made, and a receipt was given for the amount of the share deductions. The plaintiff claimed under s. 4 of the Truck Act, 1831, to recover wages earned by her in the service of the company and not paid in current coin of the Realm, being the amount of deductions from the wages made for the purpose of paying for the shares which she had applied for and had been allotted to her. The company counterclaimed to recover the price of the shares. The county court judge held that there had been no contravention of the Truck Act, 1831, and that therefore the plaintiff was not entitled to recover; and that even if the contract to pay for the shares was null and void as being a contravention of the Truck Act, the contract to take and pay for the shares was severable from the illegal contract and the company was therefore entitled to succeed upon their counterclaim. On appeal by the plaintiff:—

Held, that the transaction was a violation of the Truck Act, 1831, as the whole of the plaintiff's wages had not been actually paid to her in the current coin of the Realm, and the fact that

C. A.
1936

Kenyon
v.
Darwen
Cotton
Manu-
facturing
Co.

the plaintiff acquiesced in the deductions made from her wages in order to pay for her shares made no difference. Sect. 1 of the Act of 1831 made the contract illegal, null and void, for the contract taken as a whole was one whereby she was to receive consideration for her labour in part otherwise than by payment of wages in current coin of the Realm, and as s. 3 made every payment of wages otherwise than in the current coin of the Realm illegal, null, and void, the plaintiff was entitled to recover under s. 4 so much of her wages as had not been actually paid in current coin of the Realm.

Further, it was impossible to sever the contract for the purchase of the shares from the illegal contract for the payment of the purchase price out of the plaintiff's wages; the two documents in fact constituted one contract, and the company were therefore not entitled to recover on the counterclaim for the price of the shares.

Appeal from a decision of the judge of the Blackburn County Court.

The plaintiff claimed under s. 4 of the Truck Act, 1831, to recover the sum of 9*l.* 18*s.* 3*d.* being wages which the plaintiff alleged had been earned by her in the service of the defendants and not paid in current coin of the Realm. The defendants counterclaimed to set off against the sum claimed by the plaintiff 11*l.* 9*s.* 11*d.* which they said was owing to them in respect of certain shares in their company which had been allotted to the plaintiff.

The material facts of the case were as follows. In 1931 the defendant company was compelled to close its mills, including the Bowling Green Mill (where the plaintiff subsequently worked at the material times), owing to economic depression. Early in 1932, as a result of joint consultations between the company and their ex-employees, a scheme was devised whereby the operatives might find capital to finance the company by subscribing for shares paid for either by lump sums or by sums proportionate to the wages which they would earn. The county court judge found that it was "a part of the scheme that shares should be paid for by extremely small and extremely frequent instalments, and that those instalments should be paid weekly out of the wages the operative would receive." The articles of association were amended on August 8 and 18, 1932, to admit of these purposes, including the prohibition of the transfer of the holdings to non-members without the sanction of the board, and on August 10, 1932, the Bowling Green Mill reopened for work.

The plaintiff was first employed at the Mill on September 5, 1932, and, in accordance with the general practice, a few days later she signed two documents bearing date September 5, 1932, the one requesting the allotment of shares, the other agreeing that the shares should be paid for out of the wages earned with a request that they should be deducted from the wages each week. The two documents were as follows:

"To the Directors of the Darwen Cotton Manufacturing Co., Ld.

"Gentlemen, September 5, 1932.

"I request you to allot me 100 shares of one shilling each in your company and I agree to accept the same or any less number that you may allot to me.

"I offer to pay for these shares at the rate of not less than ¼*d.* per share every seven days until the shares are fully paid and to hold the same upon the terms of the memorandum and articles of association of the company and I authorise you to place my name on the register of the members of the company in respect of the shares allotted to me. It is understood that I shall have permission to pay larger amounts than above in respect of the said shares if I so desire."

The other document was as follows:

"Gentlemen,

"With reference to my application for shares in your company it would be a convenience to me if you would be willing to make arrangements for payment for such shares out of the wages which I may earn in your employment and I suggest and request that you should deduct from my wages each week and allocate towards payment for my shares the following amounts:—

"If my weekly wage shall not exceed 30*s.* then I request you to make an allocation towards the shares of 10 per cent. of such wage. If my wages shall be over 30*s.* but not exceeding 38*s.*, then I request you to make an allocation of a sum equal to 12½ per cent. of such wage. If my wages shall be over 38*s*. then I request you to make an allocation of 15 per cent. of such wages.

"This request, of course, is understood to be revocable by me at any time on a week's notice."

On July 25, 1933, and on January 3, 1935, the plaintiff similarly applied for further shares and agreed to the method of payment by deduction as aforesaid.

Two methods of carrying out this scheme were in operation during the period of the plaintiff's employment. Down to November 3, 1932, the county court judge found that the practice "was to hand to every operative, including the plaintiff, loose coins equivalent to the amount of his or her net wages, after all deductions had been made, together with an envelope containing coins equivalent to the share subscription then due from him or her, and for the operative forthwith to hand back that envelope with its contents to a clerk who sat beside the clerk who was paying out wages, in exchange for a receipt. The receipt was on a printed form bearing the printed signature of the Company's manager and the initials of the clerk. It was expressed in the words 'Received the following amount on account of payment for your shares,' followed by the operative's works number, the amount and the date."

After November 3, 1932, the use of envelopes was discontinued and all that was handed to the operatives was the net amount of his wages after all deductions, including the deductions for shares, had been made, and a receipt given for the amount of the share deductions.

The county court judge found that there was a contract between the plaintiff and the company that a certain part of her wages should be applied in the purchase of shares, and that she owed the continuance of her employment to the signature of her application for shares and her request that they should be paid for by deduction from her wages, and that it was a term of the contract under which her employment was continued that she should subscribe for her due proportion of shares and enter into the agreement constituted by her signature of the request. He said that though it was intended that so many of those coins as were required to pay the weekly instalment on the plaintiff's shares should as a matter of convenience be immediately handed back by her to the company's representative, yet there would have been no breach of contract had the plaintiff walked out of the payroom with those coins and later the same day returned with other coins of an equivalent amount and paid those other coins to the company, and therefore there had been no contravention of the Truck Act, 1831 (1), and the plaintiff was not entitled to

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(1) Truck Act, 1831, s. 1: "Whereas it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the Realm; be it therefore enacted . . . . that in all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this Realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null, and void."

Sect. 2: "And be it further enacted, that if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void."

Sect. 3: "And be it further enacted, that the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this Realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void."

Sect. 4: "And be it further enacted, that every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this Realm."

Sect. 25: "And be it further enacted and declared, that in the

C. A.
1936

KENYON
v.
DARWEN
COTTON
MANU-
FACTURING
Co.

recover. He also held that even if the contract for the payment of the shares was null and void as being a violation of the Truck Act, the contract to take and pay for

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meaning and for the purposes of this Act, all workmen, labourers, and other persons in any manner engaged in the performance of any work, employment, or operation, of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed 'artificers'; and that within the meaning and for the purposes aforesaid, all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers, shall be and be deemed to be 'employers'; and that within the meaning and for the purposes of this Act, any money or other thing had or contracted to be paid, delivered, or given as a recompence, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the 'wages' of such labour; and that within the meaning and for the purposes aforesaid, any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract.'"

Truck Amendment Act, 1887, s. 1: ". . . . the principal Act [1 & 2 Will. 4, c. 37] may be cited as the Truck Act, 1831, and that Act and this Act may be cited together as the Truck Acts, 1831 and 1887, and shall be construed together as one Act."

Sect. 2: "The provisions of the principal Act shall extend to, apply to, and include any workman as defined in the Employers and Workmen Act, 1875, s. 10, and the expression 'artificer' in the principal Act shall be construed to include every workman to whom the principal Act is extended and applied by this Act, and all provisions and enactments in the principal Act inconsistent herewith are hereby repealed."

Sect. 14: "In this Act, unless the context otherwise requires,— . . . . other expressions have the same meaning as in the principal Act."

Sect. 17: "The Acts mentioned in the Schedule to this Act are hereby repealed to the extent in the third column of the said Schedule mentioned . . . ."

SCHEDULE.

Session and Chapter.

. . . .

1 & 2 Will. 4, c. 37.

Title of Act.

. . . .

[Truck Act, 1831.]

Extent of Repeal.

. . . .

". . . . section 25 from 'all workmen' to 'purposes aforesaid' both inclusive . . . ."

Employers and Workmen Act, 1875, s. 10: "In this Act—The

the shares was severable from the illegal contract, and the company were therefore entitled to succeed upon their counterclaim.

The plaintiff appealed. The appeal was heard on January 30 and 31 and judgment was given on February 14, 1936.

Sir William Jowitt K.C. and *Basil Nield* for the appellant. The question is whether the scheme adopted by the respondents by which deductions were made from the appellant's weekly wages in respect of the payment for shares in the company, constituted a breach of the Truck Acts, 1831 and 1887. Those Acts are specific in requiring that the wages of operatives shall be paid " in the current coin of this Realm," unless bank-notes are agreed to be taken by the operative. Further, s. 3 of the Act of 1831 requires that " the entire amount of the wages . . . . shall be actually paid . . . . in the current coin of this Realm, and not otherwise." Certain exceptions to the generality of these provisions are permitted by s. 23 of the Act of 1831, but none of these apply to the facts in the present case. Sect. 4 of the same Act gives a right to the operative to recover from the employer so much of the wages as have not been actually paid in the current coin of the Realm. In *Hewlett* v. *Allen & Sons* (1) the Court of Appeal held that deductions from an operative's wages paid over to a sick and accident club, of which she was required to become a member, could not be justified under the Truck Acts; but that view was not accepted in the House of Lords (2), where it was held that the entire amount of her wages had, within the meaning of the Truck Acts, been paid to the operative, and that, even assuming that there was any illegality, the

expression ' workman ' does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

(1) [1892] 2 Q. B. 662.

(2) [1894] A. C. 383.

employers, by making the weekly payments out of the operative's wages to the sick club with her assent, had discharged their obligations to her. In the later case of *Williams* v. *North's Navigation Collieries* (1) the House of Lords held that the Act of 1831 did not allow the deduction from a workman's wages of money which a court of summary jurisdiction had ordered the workman to pay to the employer in respect of breaches of contract; and in the Irish case of *Glasgow* v. *Independent Printing Co.* (2), on facts very similar to those in the present case, the Court of Appeal held that the deduction from wages in respect of shares in the company to be taken by the workman constituted a breach of the Truck Acts, and that the workman was entitled to recover from the employers the amount of those deductions. That exactly covers the present case. So too does the most recent decision of *Penman* v. *Fife Coal Co.* (3), where *Hewlett* v. *Allen* (4) was distinguished, and it was held that deductions made with the workman's written consent from his wages in respect of arrears of rent due to the employers from the workman's father constituted an illegal deduction, and that the workman was entitled to recover the amount so deducted. That case governs the present case and entitles the appellant to succeed.

B. Ormerod (*Comyns Carr K.C.* with him) for the respondents. The county court judge drew the inference of fact which he was entitled to draw—namely, that, at all events when the envelope system was in practice, the handing of the two envelopes to the appellant involved a complete payment to her, she being under no obligation to return to the employers the second envelope with the identical coins which had been placed in it by the respondents. The appellant had not merely physical control of the money in the envelope; she had actual possession of the coins, and therefore the county court judge was right in finding as he did. The mill had been closed owing to bad trade, and the workpeople were extremely anxious that the mill should reopen, and it was at their instance that this scheme was devised by which they were to subscribe for shares in the company and pay for them week by week out of their earnings. The words "actually paid" in s. 3 of the Truck Act, 1831, mean shall be paid in fact. The appellant had entered into an obligation to take up shares in the company and was willing to honour her obligation. She was aware that the only way in which she could pay for her shares was by deductions week by week out of her wages. The appellant could have taken the coins in the envelope away with her and later in the day paid her weekly subscription for the shares out of other money. If a clerk of the company had received weekly subscriptions from the workpeople for their shares on a later day than that on which the wages were paid it could not be said to be an infringement of s. 1 of the Truck Act, 1831.

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(1) [1906] A. C. 136.
(2) [1901] 2 I. R. 278.
(3) [1936] A. C. 45.
(4) [1894] A. C. 383.

[SCOTT L.J. The test is whether the workman is free to do what he pleases with his wages. In the present case it is very clear that the appellant was not free to do what she liked with her wages.]

When the scheme was adopted the respondents assumed that they were not doing anything contrary to the Truck Acts in making these deductions with the assent of the appellant. That contention was, however, abandoned in the county court owing to the decision of the House of Lords in *Penman* v. *Fife Coal Co.* (1) In that case the workman in order to keep a roof over his father's head agreed that the rent should be paid by deductions out of his wages. It is true that the respondents have failed to pay to the appellant the whole of the wages earned by her, and therefore may be liable to a prosecution under the Factory Acts, and also may be liable to have an action brought against them by the appellant in order to recover those wages; but in that case the respondents would be entitled to set off against her claim for wages the money due from her under her contract to take up and pay for the shares. In *Penman's* case (1) there could not be any set-off. Set-off is a statutory right which the Truck Acts do not touch.

(1) [1936] A. C. 45.

[SLESSER L.J. Is not a counterclaim in a different position from a set-off? You are counterclaiming for the price of the shares.]

The amount due from the appellant to the company on her contract to take up and pay for the shares exceeds the amount due to her from the company for unpaid wages, and therefore the company claim to set off the amount due in respect of unpaid wages against the same amount being part of the amount due from the appellant to the company in respect of the shares, and they counterclaim for the balance.

[SLESSER L.J. Under s. 2 of the Truck Act, 1831, the contract is declared to be illegal, null, and void. It would therefore appear that the whole contract has gone and not merely the illegal provisions.]

If the whole of the contract to take shares in the respondent company is illegal, null, and void, there can be no set-off or counterclaim against the appellant. The county court judge has held that there were three contracts: (1.) Contract to employ the appellant and to pay her wages. (2.) Contract by the appellant to take up and pay for shares in the respondent company. (3.) Request by the appellant to the respondent company to make deductions out of her wages each week in payment for the shares.

[SLESSER L.J. In my view all three contracts are knit together into one contract.]

A contract to take up shares in a company is not illegal as being contrary to the Truck Acts. Willes J. said in *Pickering* v. *Ilfracombe Ry. Co.* (1): "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." The Truck Acts are an interference with the freedom of contract, and therefore they must be construed as strictly as possible, and if the illegal portion of the contract can be severed from the legal portion it must be severed. Sect. 4 of the Truck Act, 1831, shows that some

(1) (1868) L. R. 3 C. P. 235, 250.

portion of the contract must be left in force, although shorn of some of its provisions, because under that section the workman may recover so much of his wages as has not been paid to him in the current coin of the Realm. The original contract was only a contract to employ and did not contain any agreement by the workpeople to take up shares and pay for them by deductions out of their wages. The second contract to take up shares may be illegal as contravening the Truck Acts, but that does not put an end to the first contract. If the contract is one contract, s. 2 does not render the whole contract null and void, but only those portions of the contract that offend against the Truck Acts. Two contracts may be dependent on each other, but that does not make the contract illegal which is not contrary to the Truck Acts. The contract to pay for shares by deductions from wages is not part of the contract to employ or of the contract to take up and pay for the shares. The last two contracts remain good although the contract to pay for the shares by deductions from wages may be illegal. If they are separate contracts the right of set-off is not taken away. Sect. 1 of the Act of 1831 deals only with the contract of hiring, whereas s. 2 deals with any contract between workman and employer where the relationship of employer and workman exists.

Cur. adv. vult.

1936. Feb. 14. The following judgments were read :—

SLESSER L.J. This appeal concerns a claim made under s. 4 of the Truck Act, 1831, for 9*l.* 18*s.* 3*d.*, being wages which the plaintiff alleges have been earned by her in the service of the defendants and not paid in current coin of the Realm. The defendants counterclaim to set off against the sum claimed by the plaintiff 11*l.* 9*s.* 11*d.*, or some lesser sum, which they say is owing to them in respect of certain shares in their company which have been allotted to the plaintiff.

The material facts of the case are as follows. [He then stated the facts set out above and continued.] In my opinion, no difference of principle arises between the two methods of carrying out the scheme which were in operation during the period of the plaintiff's employment. If the latter method was a violation of the Truck Acts, so also was the former. That is to say although, up to November, 1932, the plaintiff was given coins of the Realm, equal in amount to the whole of her wages, the arrangement (which was part of the general dealing between the parties) that she should straightway hand part of them back to an agent of the company, makes it impossible for the employers to say that those coins, though paid to her in one sense, were actually paid to her as wages. Although possibly not devised to avoid the Truck Acts, yet the transaction was merely colourable in that she was under obligation immediately to part with the coins so that they never became in her hands a payment for wages at all.

I disagree, therefore, with the learned county court judge when, having found " that it was intended that so many of those coins as were required to pay the weekly instalment on her shares should as a matter of convenience be immediately handed back by her to the company's representative," he erroneously applied the test that in his view " there would have been no breach of contract had the plaintiff walked out of the pay room with those coins and later the same day returned with other coins of an equivalent amount and paid those other coins to the company." The test to be applied under s. 4 is: Were her wages actually paid to her in the current coin of the Realm? To my mind, it is clear that they were not.

So far as concerns the later arrangements between the parties to pay for the shares by direct deduction it is scarcely disputed but that this plaintiff did not have her full wages paid in current coin of the Realm. The fact that she acquiesced, directly or inferentially, to such deductions is no defence: see *Penman* v. *Fife Coal Co.* (1), where a workman having signed a written consent to a deduction from his wages to pay his father's rent, it was held that he was entitled to recover the sum claimed, as the deductions were illegal, null, and void.

(1) [1936] A. C. 45.

In *Hewlett* v. *Allen & Sons* (1) it had been held in the Court of Appeal that the plaintiff was precluded by her acquiescence in certain deductions from wages paid over to a benefit club from recovering those amounts under the Truck Act, but the House of Lords (2), while dismissing the appeal on the ground that the respondent by making the weekly payments to the club with the assent of the appellant had discharged his obligations to her, proceeded on the basis, as was stated by Lord Herschell (3), that " a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed, ... is in the sense and meaning of those sections a payment to the person employed as much as if the current coin of the Realm had been placed in his or her hands." That is to say, as was pointed out by Lord Macmillan in *Penman's* case (4), although the Court of Appeal had held that the deductions were in contravention of the statute, the House had held there was no contravention. In the present case, the deductions were actually made in order to pay the employers themselves, and, in this respect, this case resembles the case of *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (5), where a court of summary jurisdiction having ordered a workman to pay to his employer money in respect of breaches of contract to work, it was held that the Truck Act, 1831, did not allow the employer, when paying wages, to make deductions to cover such payments, as such deductions were not expressly sanctioned by the Truck Act, 1831. There Lord Atkinson points out (6) that in *Hewlett* v. *Allen* (7) the " payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts."

I think that the effect of s. 1 of the Truck Act, 1831, which provides that " in all contracts hereafter to be made for the hiring of any artificer " [now " workman ": see Truck Act, 1887, s. 2] . . . . " the wages of such artificer shall be made payable in the current coin of this Realm only, and not otherwise," makes the contract in the present case illegal, null, and void, for there being, in the opinion of the county court judge, a contract between the woman and the defendant company that a certain part of her wages should be applied in the purchase of shares, coupled with a finding of fact that the plaintiff owed the continuance of her employment to the signature of her application for shares and the request that they should be paid for by deduction, and further that those were terms of the contract under which her employment was continued, it follows that the contract taken as a whole was one whereby she was to receive consideration for her labour in part otherwise than by payment of wages in current coin of the Realm.

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(1) [1892] 2 Q. B. 662.
(2) [1894] A. C. 383.
(3) Ibid. 389.
(4) [1936] A. C. 54.
(5) [1906] A. C. 136.
(6) Ibid. 146.
(7) [1892] 2 Q. B. 662; [1894] A. C. 383.

Moreover, by s. 3 of the 1831 Act, there being an obligation actually to pay the wages in such coin of the Realm, every payment in respect of such wages otherwise than in the current coin of the Realm being declared illegal, null, and void, it follows that both the contract and the payment (in so far as it was otherwise than in coin) were alike ineffectual.

On this finding, s. 4 of the 1831 Act comes into operation, and the plaintiff, by statute, became entitled to recover so much of her wages as had been actually paid not in current coin. Her claim therefore succeeds.

But the matter does not end here. The defendants, as I have said, have counterclaimed for the price of the shares which she has undoubtedly received, and their right to be paid for such shares must depend upon whether the agreement to take and pay for the shares is so severable from the illegal contract to be paid otherwise than in current coin of the Realm as to be enforceable. The learned county court judge has come to the conclusion that these are severable agreements, for he distinguishes between the contract to purchase the shares and the contract for the payment of the purchase price out of wages. In my opinion, this is an unjustifiable distinction. I am unable to distinguish, when all the circumstances of this case are considered, between the case where there was a direct agreement for the deduction from wages to be applied to purchase shares of the defendant company, such as was the case of *Glasgow* v. *Independent Printing Co.* (1), which I think was rightly decided, and the present one, where the only difference is that there are two documents instead of one, the former being an application for shares and the latter, signed and dated the same day, an agreement purporting in terms to refer to the former, that the payment for such shares should be out of the wages. The second document, which has been called the "request," says: "With reference to my application for shares in your company it would be a convenience to me if you would be willing to make arrangements for payment for such shares out of the wages which I may earn in your employment and I suggest and request that you should deduct from my wages each week and allocate towards payment for my shares" certain amounts.

Not to regard these documents as the terms of one contract, and that the contract containing the consideration for the labour of the plaintiff, appears to me to be entirely artificial, and in my view what is said to be enforced by the set-off or counterclaim is no more than the enforcement of a term of what I have decided to be an illegal and void contract.

It is further argued that, in so far as s. 4 of the 1831 Act entitles the plaintiff in a proper case to recover the whole or so much of the wages earned by her as have not been actually paid in the current coin of the Realm, s. 1 cannot have the effect alleged of completely destroying the contract of employment, for, it is said, were it so, there would be no wages in whole or in part to be recovered and the appropriate remedy would be in damages for a quantum meruit.

I do not so read the Act. In my opinion, s. 1 makes the whole contract illegal, the contract being, according to s. 25, inclusive of "any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them."

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(1) [1901] 2 I. R. 278.

These words are clearly wide enough to cover the whole of the arrangements here made; but while the whole contract is at an end the wide definition of wages, that is "any money or other thing had or contracted to be paid, delivered, or given as a recompence, reward, or remuneration for any labour done," seems to me sufficient to identify the word "wages" in s. 4 as being the remuneration for labour done without any necessity to have further recourse to s. 1 except as a matter of quantification to see what those wages actually were. It was further said, in answer to this reliance on this wide definition, that this definition of the word "wages" had been repealed by the Truck Amendment Act, 1887, in the schedule which excludes from s. 25 of the Act of 1831 the words from "all workmen" to "purposes aforesaid." The words "purposes aforesaid" occur twice in s. 25, but it is quite clear not only as a matter of general construction but as a matter of definition derived from the context that it is the first time the term "purposes aforesaid" occurs, which is the terminus of the words to be deleted. That is to say there being substituted by s. 2 of that Act, "any workman, as defined in the Employers and Workmen Act, 1875," in place of the word "artificer" in the 1831 Act, this is but a consequential amendment, deleting the definition of "artificer" and no more. The definition of wages stands as it did in the Act of 1831.

In the result, therefore, I am of opinion that this appeal succeeds; that there should be judgment for the plaintiff for 9*l.* 18*s.* 3*d.*, that the counterclaim should be dismissed and that the appellant should have the costs of the appeal and the costs of the claim and counterclaim below. The costs in the county court to be on Scale C.

SCOTT L.J. I agree with Slesser L.J.'s general statement of the facts in his judgment and with the result at which he arrives. I have considered all the main decisions and believe that the following interpretation of the relevant sections of the Acts is consistent with the present state of the authorities. I do not propose to discuss them at large, although I shall, at a later stage of my judgment, refer to certain expressions of opinion in them. I base my judgment upon that interpretation.

By s. 1 of the Truck Act, 1887, it and the principal Act (i.e., that of 1831) are to be construed as one Act. Sect. 2 extends the categories of workmen to whom the Truck Acts apply. The plaintiff is a workman within the extended categories. Sect. 14 adopts the definitions contained in s. 25 of the 1831 Act (except for a repeal of the early part of s. 25 which is irrelevant to the present case). The definitions of "wages" and still more of "contracts" contained in s. 25 of the 1831 Act (as amended) are of cardinal importance to the interpretation of the crucial sections of the combined Act, upon which this appeal turns: they are as follows: "Within the meaning and for the purposes of this Act, any money or other thing had or contracted to be paid, delivered, or given as a recompence, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the 'wages' of such labour; . . . . within the meaning and for the purposes aforesaid, any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and" [workman] "are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a 'contract'."

Both definitions disclose an intention of the Legislature to avoid the risk of narrow legal interpretation; to include within the word "wages" any consideration whatsoever given or to be given in or under or for the contract of hiring, and within the word "contract" any arrangement whatsoever, direct or indirect, or whether actually agreed to, or only a term which one party to the hiring contract has endeavoured to impose on the other, on the subject of wages. It is plain from the quite extraordinarily wide and all-embracing phraseology of the section, that even collateral arrangements affecting, however indirectly, the hiring relationship between employer and workman must be deemed to fall within the

C. A.
1936

KENYON v. DARWEN COTTON MANUFACTURING CO.

Scott L.J.

word " contract," wherever that word is used in the operative sections of the Acts. It is thus necessary to embark upon the task of construing those sections with the above mandatory direction of s. 25 always in mind, because without it some of the provisions might easily be given too narrow a meaning. The vital sections are the first four of the 1831 Act.

" Wages " and " contract " being so defined, s. 1 makes it expressly illegal for the employer to give to the workman for his labour any consideration whatsoever except current coin of the Realm. In addition it forbids any promise—whether in the hiring agreement itself, or in some separate agreement entered into by way of consideration for, or as a condition of the making of the hiring agreement—by the employer to give to the workman money's worth instead of current coin. If the employer for instance is a company and persuades a workman to enter into or remain in its service on the terms of his accepting a portion of his wages in the form of certificates for shares in the company or in signed receipts for payment of instalments of the cost of such certificates, the wages are in part " payable in a manner other than payment in current coin," and the transaction falls within the express prohibition. And by whatever device or understanding and however indirectly this result is brought about, the inhibition of the statute attaches. If the agreement took the form of an independent and voluntary application by the workman for shares, and an arrangement for weekly payments of the application money with nothing else said, but there was an understanding that the workman would out of his wages make the weekly payment, I think the wages would be payable in shares and not in current coin and therefore in defiance of s. 1, just as much as if the hiring agreement itself said that the employer would pay the workman so much in current coin and the balance in signed receipts for instalments of application money. The former would be merely an " indirect device " for bringing about the same result as the latter arrangement would achieve " directly." The provisions of s. 25 that a mere " understanding," and a fortiori a mere " endeavour to impose an obligation " is to be deemed a " contract " are in my view conclusive that this extremely wide view of the scope of s. 1 is right. If it is, then the whole network of " agreements, understandings, devices, contrivances, collusions whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and workman are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them " is made illegal by the last line of the section.

Sect. 2 proceeds on the basis of this same wide conception of the contractual relationship. It assumes a case in which there is no contravention of s. 1, and is aimed only at arrangements as to the way in which wages in current coin of the Realm are to be " laid out or expended." It expressly prohibits the insertion of any such arrangements in the " contract ", and as a sanction for enforcement the whole " contract " (defined as above) is, in the event of breach of the prohibition, made illegal and void: the collateral arrangements and understandings are swept away as unequivocally as the hiring agreement itself.

If ss. 1 and 2 have the above effect, s. 3 would seem at first sight superfluous; and for that reason might afford ground for argument that ss. 1 and 2 cannot have the meaning I attribute to them. There are, however, two answers to that argument. In the first place the statute was intended to be a charter of liberty to workmen which they could easily understand; and in 1831 the education of the working classes was not what it is to-day. It was for this reason important for Parliament to make very plain—even to the point of repetition—the workman's right to receive his whole remuneration in current coin of the Realm. In the second place the phrase " actually paid " both bears out the same intention, and, as it seems to me, imports something further. The money must be paid over so completely and finally that it then and there becomes the workman's very own, being received into his possession subject to no sort or kind of understanding however tacit that he is either to return any part of it or use it in a particular manner or lay it out for a particular purpose.

The phrase precludes the idea of any payment which is not final and absolute, it calls for a payment which shall leave the payee wholly free and untrammelled in his enjoyment of it, and by implication forbids the exaction of any condition or promise or obligation from him as recipient as to what he will do with his money after receipt.

Sect. 4 manifests the same intention to make the workman's rights absolutely clear ; but it is in addition an indispensable provision. The whole of the contractual arrangements between the parties being void, the workman is left with no contract upon which to found a cause of action for wages. It is therefore necessary to give him a statutory right of action, and this is the main purpose of s. 4. But for the extremely wide definition of the word "contract," contained in s. 25, it might have been arguable that the "contract" avoided by ss. 1 and 2 was only so much of the contract of hiring as offended against the provisions of those sections. But that definition precludes any such limiting construction, and makes it clear, as I have said above, that the whole set of arrangements between employer and workman which contain or are directly or indirectly concerned with the agreement of hiring are brought within the statutory net and avoided lock, stock and barrel, if any one provision offends against the statute. I merely add, to avoid misconception, that there may be lawful agreements so completely severable from the tainted "contract" as defined by s. 25 as to permit a decision on particular facts that some such agreement lay outside the mischief of the statute ; but it is not necessary or desirable to express any opinion about such a possible case—even as to its possibility.

Sect. 4 does not expressly state what is to be the measure of the statutory right to wages, nor what the conditions of service are to be ; but I think the proper construction of the section is to treat it as repeating those terms of the agreement of hiring which do not offend directly or indirectly against the statute : there is no other measure of amount or time of payment or of the necessary terms of the mutual obligations under the hiring relationship.

Sects. 5 and 6 of the Act of 1831 and s. 5 of the Act of 1887 are not easy to fit into the general framework of the Acts and they have caused much legal doubt in the past. But for reasons I give below I do not think that the decision of this case turns upon them.

In the present case the learned county court judge has clearly found as a fact that the undertaking of the plaintiff to take and pay for shares, in accordance with the practice described by him in his judgment, was an integral part of her contractual arrangements with the defendant company, which included the actual agreement of hire. The whole of the arrangements followed by the bulk of the employees at the mill as a whole must, on the findings of the learned judge, for the purposes of the Truck Acts be regarded as a course of dealing agreed between the parties to this appeal and included within the contract of hire in the wide sense of the word "contract" as defined by the Acts. There can be no question that as from November 3, 1932, when the practice of putting the amount of the weekly share subscription into a separate envelope was discontinued, the procedure followed was an offence against the statute, and that the whole set of arrangements was avoided by the express provisions of the statute. I do not think that the device of putting part of the wages into one envelope, and another part equal to the amount of the weekly subscription which the employee had undertaken to make in part payment of his shares into a second envelope, makes any difference in law. It was, I think, a mere "understanding, device, contrivance, collusion or arrangement" within the meaning of s. 25 and was therefore forbidden by the express prohibitions of ss. 1 to 4 of the Act of 1831. I do not think that there is anything contained in any of the judgments in *Hewlett* v. *Allen* (1); *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (2); or *Penman* v. *Fife Coal Co.* (3) which is inconsistent with my interpretation of the sections as stated above, and, on the contrary, it was repeatedly pointed out in those cases that an employer is

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(1) [1892] 2 Q. B. 662; [1894] A. C. 383.

(2) [1906] A. C. 136.

(3) [1936] A. C. 45.

C. A.
1936

KENYON
v.
DARWEN
COTTON
MANU-
FACTURING
CO.

Scott L.J.

not entitled to retain a part of the workman's wages in payment of a debt to himself, as was the case here.

It only remains to consider whether the alternative counterclaims, or any of them, of the respondent company were admissible. In my view none of them were, as the cause of action upon which the counterclaim was based was the very agreement to take and pay for shares which, if the previous part of this judgment is correct, was avoided by the wide operation of ss. 1 to 4 interpreted in the light of s. 25 of the Act of 1831. This distinguishes the position in the present case altogether from what it would have been if a counterclaim had been based on some entirely separate contract which fell wholly outside the statutory net thrown over the contract of hiring as defined by s. 25 of the Act of 1831—as, for instance, a debt of the workman for a private loan from the employer. That kind of question is wholly outside the facts of the present case, and I say nothing about it.

In the result I agree that the appeal should be allowed; that judgment should be entered for the appellant for 9*l.* 18*s.* 3*d.*, and that the counterclaim should be dismissed.

EVE J. I agree that this appeal must succeed. Throughout the whole period of the plaintiff's employment by the defendant company there was, in my opinion, a persistent disregard of the statutory obligation to pay to her in the current coin of the Realm the entire amount of the wages earned by her for her labour at the mill.

Moreover it was a term of her employment that she should apply for and accept allotments of shares in the company's capital and that payment for such shares should be made by deduction of the same from her wages earned in the company's employ. On the evidence it is impossible to say that the contract to take and pay for shares was a separate one, and, in my opinion, the arrangement relating to the shares was only another attempt to evade the provisions of the Truck Acts.

Appeal allowed. (4)

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(4) Leave was granted to the respondents to appeal to the House of Lords.

C. A.
1936
KENYON
v.
DARWEN
COTTON
MANU-
FACTURING
CO.

Solicitors for appellant: *L. Bingham & Co., for T. Holden, Blanthorne & Davies, Blackburn.*

Solicitors for respondents: *Haslam & Sanders, for Hindle, Son & Cooper, Darwen.*

R. F. S.

STEVENS *v.* WALKER.

[1936. S. 7.]

C. A.
1936
April 6.

Practice—Accident—Action for damages for negligence—Defendant's application for security for costs and in default for transfer of action to county court—Discretion of judge—Exercise on wrong principles—County Courts Act, 1919 (9 & 10 *Geo.* 5, *c.* 73), *s.* 2.

The County Courts Act, 1919, s. 2, provides: "In any action founded on tort commenced in the High Court, the defendant may, on an affidavit made by himself or by any person on his behalf, showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, apply to the court or a judge for an order to transfer the action to a county court; and thereupon the court or judge, unless the plaintiff satisfies the court or judge that he has such means, may, if the court or judge having regard to all the circumstances of the case thinks fit so to do, make an order that unless the plaintiff within a time to be limited in the order gives security for the defendant's costs to the satisfaction of the court or a judge the action shall be transferred to such county court to be named in the order as the court or judge may deem the most convenient to the parties":—

Held, that in exercising his discretion the judge ought to have serious regard to the gravity of the case and the magnitude of the interests involved and to the question whether the defendant has prima facie a good defence to the action.

Where in an action brought by a plaintiff who sustained grave injuries by the overturning of the lorry in which he was a passenger against the owner of the lorry for damages for negligence, the defendant applied before delivering her defence for security for costs and in default for the transfer of the action to the county court, but by her affidavit in support made no allegation that she had a good defence on the merits,

Held, by the Court of Appeal (reversing the decision of du Parcq J.), that there was no sufficient material available for the exercise by the judge of his discretion by making the order asked for, and accordingly that the order must be set aside.

APPEAL from du Parcq J.

On July 18, 1935, the plaintiff, Benjamin Stevens, was a passenger upon a motor lorry the property of the defendant, Eva Walker, which was being driven by Malcolm I. Walker on her behalf along the Doncaster Road, Hickleton, towards Goldthorpe, Yorkshire, when the motor lorry overturned.

By a writ dated January 23, 1936, the plaintiff commenced an action in the High Court for damages for negligence, and by his statement of claim dated February 22, 1936, he alleged that the overturning was due to the negligence of the driver, and that in consequence of the overturning he sustained grave injuries, suffered much pain, and had been and would be incapable of obtaining employment. He said that he had also been put to expense, and on all these grounds he claimed damages for negligence.

Before delivering any defence the defendant applied for security for costs and in default to have the action transferred to the county court, and by her affidavit in support dated February 26, 1936, she stated that the plaintiff resided at Mexborough, near Rotherham, with his parents and was a single man, that he was a labourer and had been unemployed for about nine months, and that for these reasons he was without visible means of paying High Court costs should a verdict not be found in his favour. The affidavit contained no allegation that the defendant had a good defence on the merits.

By an order dated March 5, 1936, the Wakefield District Registrar ordered the plaintiff to give security for costs by payment of 50*l.* into Court within fourteen days, and that in default of such payment the action should be transferred to the Doncaster County Court. On an appeal from this order du Parcq J. by an order dated March 20, 1936, reduced the amount of security to 25*l.* and directed that the time for giving security should run from the date of his order; but that in all other respects the order of the Registrar should stand.

du Parcq J. refused leave to appeal from this order on the ground that the matter was purely discretionary, but the

Court of Appeal gave leave to appeal. The plaintiff thereupon appealed. The appeal was heard on April 6, 1936.

Wilfrid Clothier K.C. and *H. H. Maddocks* for the appellant. By s. 2 of the County Courts Act, 1919, the court or a judge is given power to transfer actions founded on tort commenced in the High Court to the county court if the defendant by an affidavit shows that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found in the plaintiff's favour. That section took the place of s. 66 of the County Courts Act, 1888, which in its turn had taken the place of s. 10 of the County Courts Act, 1867. It is claimed that this case ought to be heard in the High Court in view of the severity of the plaintiff's injuries. The earlier sections provided that the court or a judge should consider whether the case was more fit to be tried in the High Court, but the omission of these words in s. 2 of the Act of 1919 makes no difference. The matter is within the discretion of the court, which will consider whether in all the circumstances it is proper to remit the case to the county court. The statement of claim makes it clear that the injuries to the plaintiff were very grave, but du Parcq J. thought this was not a decisive factor, and attached far more importance to the consideration whether any question of great legal difficulty was involved. But the gravity of the injuries has always been considered very material and, if it were not, an accident case concerning a workman would never be heard in the High Court. du Parcq J. was in error in thinking that the severity of the damages was not an important element to be taken into account: *Critchley* v. *Brown* (1) and *Palmer* v. *Roberts*. (2)

Further it is a fallacy to say that any case where difficult questions of law have to be decided ought to be retained in the High Court. County court judges often have to deal with difficult questions of law, but they have no experience in assessing damages on a high scale. Therefore it is a mistake to attach great importance to the fact that difficult questions of law are involved and to disregard the gravity of the injuries:

(1) (1885) 2 Times L. R. 238.

(2) (1873) 29 L. T. 403.

compare *Owens* v. *Woosman* (1), where Cockburn C.J. said that matters to which regard should be had were "the magnitude or importance of the issues involved or even . . . . any difficulty in point of law."

[LORD WRIGHT M.R. Has there been no reported case since the Act of 1919 came into force giving any direction as to the circumstances to be taken into account ?]

The only reported case is *Cook* v. *Imperial Tobacco Co.* (2), but that is not very material. It decided that a case might in the exercise of the judge's discretion be remitted to the county court, although the result might be to deprive a person suing as a poor person of ability to enforce the action for want of means; but that this was a factor to be taken into account: compare *Perry* v. *London General Omnibus Co.* (3) At that time a person could not sue in the county court as a poor person, but that has been altered when such a case is remitted to the county court by Order XXXIII., r. 20, of the County Court Rules, 1903 to 1928.

In a case such as this where the judge has to exercise his discretion the Court of Appeal will allow an appeal when the discretion has been exercised on the wrong principle: *Farrer* v. *Lowe* (4) and *Lea* v. *Parker*. (5) Here the judge had not got all the material facts before him. The issues in the action had not been defined, because the defence had not been delivered and the defendant failed in his affidavit to state on oath that he had a good defence on the merits. It is true that s. 2 of the Act of 1919 does not provide for this, but the allegation appears in Chitty's King's Bench Forms, 16th ed., p. 1020, accompanied, it is true, by the comment that this statement may be added but is not necessary.

[CHARLES J. It seems to me to be essential that either the defence should have been delivered or this statement be made in the affidavit.]

There is the further element here that the damages were likely to be heavy. It is submitted that on all these grounds the Court ought to allow the appeal.

(1) (1868) L. R. 3 Q. B. 469.
(2) [1922] 2 K. B. 158.
(3) [1916] 2 K. B. 335.
(4) (1889) 5 Times L. R. 234.
(5) (1884) 13 Q. B. D. 835, 838.

[They also referred to *Banks* v. *Hollingsworth* (1) and *Jennings* v. *London General Omnibus Co.*(2)]

The respondent did not appear.

Lord Wright M.R. This is an appeal, brought by special leave given by this Court, from an order of du Parcq J. remitting to the county court an action brought by the plaintiff, the appellant here, in the High Court.

The Registrar made an order remitting the action unless 50*l.* was lodged as security by the plaintiff, and that order was affirmed, subject to a variation, by du Parcq J., the variation being that the amount of the security was reduced from 50*l.* to 25*l.* The jurisdiction to make an order of that nature is now created and defined in s. 2 of the County Courts Act, 1919; that section, which deals with actions founded on tort commenced in the High Court, gives the court or a judge power to transfer the proceedings to the County Court if the defendant, by an affidavit made by himself, or by any person on his behalf, shows that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff. That is the power which the court or a judge may exercise, and prima facie will exercise, " unless the plaintiff satisfies the court or judge that he has such means," and " if the court or judge having regard to all the circumstances of the case thinks fit " to make the order. The order, as I have said, is made conditionally on the plaintiff's giving, within a time limited by the order, security for the defendant's costs.

It is material, in considering that section, to observe first of all that the foundation of the matter is the affidavit of the defendant that the plaintiff has no visible means of paying the costs of the defendant; if that foundation is laid, then the court is to have regard to all the circumstances of the case, and, having had regard to all those circumstances, is to decide whether or not it sees fit to make the order. Sect. 2 replaces an earlier section, s. 66, of the County Courts Act, 1888, where the language was somewhat different.

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(1) [1893] 1 Q. B. 442.

(2) (1874) 30 L. T. 266.

C. A.
1936

STEVENS
v.
WALKER.

Lord Wright
M.R.

The power there was conditional on the plaintiff not satisfying the judge that he has a cause of action fit to be prosecuted in the High Court. The cases before 1919 were decided on those earlier words. It does not seem to me that there is any vital difference between the language of these two Acts, and I observe that in *Banks* v. *Hollingsworth* (1), where the question was the converse question, namely, the power to remove an action from an inferior court to the High Court, the language of the statute referred to cases "fit to be tried in one of the superior Courts." Lord Esher M.R. said (2) that what was meant by that was as follows: "The question upon an application of this nature is whether, considering all the circumstances of the case and the interests of the parties and of public justice, the case ought to be tried in the High Court rather than in that in which the action was brought, and the judge who has to determine the question of removal must consider all the circumstances." If that was the true construction, as I think it was, of the corresponding section in the earlier County Courts Act, then it may be that the new section of 1919 has made no substantial difference. It has, however, clearly emphasized the fact that the court in exercising its discretion, must have regard to all the circumstances of the case; it is because of this that questions have been raised, and some differences of opinion expressed by learned judges recently, about what are the relevant circumstances which have to be considered. These questions have particularly arisen lately in regard to claims for personal injuries. As we all know now, personal injuries, owing to the great increase of motor-car traffic, are liable, if sustained, to be of a very serious nature, and in those cases the poor man is as liable to be seriously injured as the well-to-do man, and it was said very wisely by Singleton J. quite recently that it would be very undesirable if poor people thought that the doors of the High Court were closed against them. In these cases, it is very seldom indeed that there is any question of law involved. The real question, and the serious question, is as to the amount of the damages.

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(1) [1893] 1 Q. B. 442.

(2) Ibid. 447.

It is perfectly true that when a case is remitted from the High Court to the county court, a county court judge has an enlarged jurisdiction; but it is also to be borne in mind that in his ordinary experience the county court judge is not used to dealing with the very substantial sums by way of damages which may be necessary in order to give compensation—adequate so far as money can go—for a very serious injury sustained by a plaintiff. It is, therefore, clear that the court, in considering what are the circumstances in which it should exercise its discretion, ought to have regard, and have very serious regard indeed, to the gravity of the case and the fact that the damages, if awarded, would probably have to be on a large scale.

There is another most material matter which the court would take into account when considering the relevant circumstances of the case for this purpose; that is the question whether or not the plaintiff has a good prima facie cause of action, and whether or not the defendant has a good prima facie defence. That is a matter which is not referred to in terms in the section dealing with what must be contained in the affidavit. The section only requires that the affidavit should state that the plaintiff has no visible means of paying the costs of the defendant. The practice, however, has been followed from quite early times of adding to that allegation in the affidavit a further allegation on oath to the effect that the defendant has a good defence on the merits. I find that that was an allegation included in the affidavit as far back as 1873, in *Palmer* v. *Roberts* (1), where the defendant, in making his affidavit, said: "Fifthly, that I have a good defence to the action on the merits." It is said in Chitty's King's Bench Forms, 16th ed., p. 1020, in reference to that allegation in the affidavit, that although "this paragraph may be added," it is not necessary. It is true to say that it is not necessary, but, on the other hand, it is very important that it should be inserted, and, if it is inserted, the court ought to inquire into this matter with some care. It was pointed out quite recently that these applications should not be considered until

(1) 29 L. T. 403.

after the statement of claim had been delivered. I agree with that, and I go further, because I think they should not be considered until the defence has been delivered, or, at least, until there is an affidavit which shows that a defendant is in a position to swear that he has, according to his judgment, a good defence on the merits.

What I want to emphasize, therefore, as the most material circumstances to be taken into account by the court under s. 2 of the County Courts Act of 1919 are: first, the severity of the injuries in a personal injuries case and the gravity of the case for the plaintiff, and, secondly, the question whether there is a probable or prima facie defence as shown by the defendant. These two matters seem to me to be quite essential for consideration.

When I turn to the present case I do not find any precise statement by the learned judge of the matters which he considered and on which he arrived at his conclusion. He is not bound to make any such statement. But it does appear from what this Court has been told that he had not before him any statement as to the probability of the defendant having a good defence. There was certainly nothing in the affidavit, and so far as the materials before the learned judge go, that is to say, so far as the statement of claim shows on the face of it, the action was practically an undefended action. In addition, the Court have been told that the learned judge seemed to be of opinion that it was a very relevant matter whether or not there were difficult points of law to be considered. I do not say that in some cases that might not be a relevant consideration, though I should like to repeat what was said by Bramwell B. in *Palmer* v. *Roberts* (1), a case to which I have already referred. He said that it may be a very proper case for trial in a superior Court, although no difficult points of law are likely to arise. I have given reasons why I am of the same opinion.

It is perfectly true that this Court will always be very loath to interfere with the discretion of a learned judge who has

(1) 29 L. T. 403.

made an order one way or the other under s. 2 of the County Courts Act of 1919. The judge has a judicial discretion but a discretion which he has to exercise on all the circumstances of the case, and that statement undoubtedly gives him a very considerable latitude in exercising his discretion; but the authorities that have been cited show that quite clearly on occasion this Court may interfere with the discretion of a learned judge in a case of this character, just as in every other case. There are well recognized grounds on which the Court may come to the conclusion that the judge has exercised a wrong discretion, and in that case it would be bound to give effect to its view. One ground which is peculiarly important is if it is satisfied that the judge acted on "irrelevant and extraneous" or on insufficient materials. I refer to what was said by Lord Sumner in *Société des Hôtels Réunis* (*Société Anonyme*) v. *Hawker*. (1) That is merely one very striking and important instance in which the Court would be disposed to override the discretion of a judge. There are various other circumstances which may be illustrated from the cases, but I do not think it necessary to refer to them.

On the whole, in the present case I think the learned judge had not fully present to his mind the vital question of whether there was a good prima facie case or a good prima facie defence. I think he did not sufficiently consider the gravity of the claim which was put forward, and I think it appears that he attached undue importance to the question of whether or not there might be difficult questions of law involved. I feel very strongly that the discretion in these very serious personal accident cases should be exercised with very great care, and on the whole I think in the present case the learned judge exercised his discretion on inadequate material and without having before him, as he ought to have had, either the defence or a statement in the affidavit swearing that there was a good defence; and on these grounds particularly, but also in view of the other matters to which I have referred, I think that the order should be set aside and the appeal should succeed, with the result that the action will proceed in the High Court.

(1) (1914) 58 Sol. Jo. 515; 30 Times L. R. 423.

C. A.
1936

STEVENS
v.
WALKER.

ROMER L.J. I agree. Before a discretion can properly be exercised under the section in question—that is, s. 2 of the County Courts Act, 1919—it is essential that the court or a judge should ascertain precisely what are the issues that will have to be tried when the case comes on for hearing, whether it be in the High Court or the county court.

Now, in the present case the statement of claim raises two issues: (1.) whether the defendant's servant was or was not guilty of negligence, and (2.) as to the amount of damages which the plaintiff has suffered. The learned judge was not informed, either by the putting in of a defence or by the affidavit of the defendant, whether the defendant intended to dispute the allegation of negligence on the part of her servant. It appears to me that it was essential for the learned judge to have ascertained that fact before he could exercise his discretion under the section. As he had not ascertained that fact, it seems to me that the exercise of this discretion is open to review by this Court.

I will only add, as there appears to have been some difference of judicial opinion on the point, that amongst the circumstances which must be taken into consideration by the court or a judge exercising a discretion under this section there must be included the magnitude of the interests involved, just as much as the importance or difficulty of any questions of law that arise.

The appeal must be allowed and the action proceed in the High Court.

CHARLES J. I agree, and should be indisposed to add anything to that which has already been said in this Court, were it not for the fact that we are interfering with the discretion of the learned judge who made the order which is appealed from, and the further fact that I consider that this point is of very real importance to litigants. This is especially so because, as has been pointed out by my Lord, there are at this time a multiplicity of accidents, and serious accidents, which result in actions being brought for serious personal injuries, and because applications are made from time to time to transfer those actions to the county court out of the High Court on the ground that the litigant has no visible means of paying the costs of the defendant should he fail in his suit.

The matter is governed by s. 2 of the County Courts Act, 1919, and that section says "in any action founded on tort commenced in the High Court, the defendant may, on an affidavit made by himself or by any person on his behalf, showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, apply to the court or a judge for an order to transfer the action to a county court. . . . ." Now, it is to be observed that this section contains the words "should a verdict not be found for the plaintiff." In the present case there is a statement of claim, which, if uncontradicted and uninterfered with, would predicate a successful issue for the plaintiff, and no question would arise as to a verdict not being found for the plaintiff. The learned judge who considers the matter has to be satisfied, having regard to all the circumstances of the case, whether or no he will make an order under this section. Surely one of the most material considerations, and perhaps the vital consideration, that should be before the learned judge is: Ay or No, is there any defence to the action, or is there any reasonable chance of a verdict not being found for the plaintiff? That material can only be provided in two ways: (1.) by adding to the affidavit the words that the deponent swears that he is advised and verily believes that he has a good defence upon the merits, or (2.) by a defence being drawn up, and if necessary filed, before the learned judge gives consideration to the point arising under this section. In the absence of that material it appears to me that the learned judge exercised his discretion on insufficient material, and therefore that gives to the Court of Appeal the right to interfere.

I will add one word more: There has been a difference of opinion among learned judges whether or no the gravity of the injuries and the gravity of the case should affect the matter. In my opinion, it most certainly should. It is not saying anything derogatory of county court judges when one says that the whole, or the bulk, of their work is confined to adjudication upon small amounts. I cannot help feeling that in cases of real gravity—and the present case is a case of real gravity—the more appropriate tribunal is the High Court, which is frequently and constantly considering matters involving very large sums of money. I think that it might work an unconscious injustice if the matter was transferred to the county court, in that the county court judge might regard it from a point of view which would only justify him in giving much smaller damages than might be given in the High Court, and perhaps ought to be given.

For those reasons I agree with my Lords.

Appeal allowed.

Solicitors: *Maude & Tunnicliffe, agents for Green & Williamson, Wakefield.*

H. C. G.

C. A.
1936
April 22;
May 15.

ROWELL *v.* PRATT.

Discovery—Privilege—Public interest—Return to Potato Marketing Board—Agricultural Marketing Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *ss.* 1, 5, 17, *sub-s.* 2.

The Potato Marketing Board set up under the Agricultural Marketing Act, 1931, is not a Government Department, nor is a return to that Board by a grower a document privileged from production in legal proceedings by virtue of s. 17, sub-s. 2, of the Act.

So *held* by Slesser and Greene L.JJ., Greer L.J. dissenting.

APPEAL from Wisbech County Court.

The facts, which are fully stated in the judgments, were, briefly, as follows: By an agreement between the plaintiff, a farmer, and the defendant, a merchant, the latter supplied the former with a quantity of Royal Kidney potatoes to be grown for the defendant on 9½ acres on the plaintiff's farm. When the potatoes were eventually delivered the defendant alleged that he had not received all that were grown from his seed, and that potatoes of this variety had been delivered to other merchants. The plaintiff, maintaining that the defendant had received all the potatoes grown from his seed, sued for the price due to him in respect of them. The defendant, in substance, admitted the claim, but counterclaimed damages in respect of the breach of contract he alleged.

At the trial the defendant sought to have produced in evidence a return made by the plaintiff to the Potato Marketing Board set up under the Agricultural Marketing Act, 1931, which, the defendant said, would show the total acreage of the different kinds of potatoes planted by the plaintiff in the various fields. To obtain production of this return the defendant served a subpœna duces tecum on the Potato Marketing Board, and an official of that Board attended in Court with the report, but claimed privilege in respect of it under s. 17, sub-s. 2, of the Agricultural Marketing Act, 1931. (1)

The county court judge decided that the return was privileged from production, and on the evidence of the witnesses called at the hearing he held that the defendant

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(1) Agricultural Marketing Act, 1931, s. 1, provides for schemes regulating the marketing of agricultural products by the producers.

Sect. 5: "Subject to the approval of the Minister, a scheme may provide for all or any of the matters set out in one or more of the following paragraphs, that is to say . . . .

"(*h*) for requiring registered producers to furnish to the board such estimates, returns, accounts and other information relating to the regulated product as the board consider necessary for the operation of the scheme."

Sect. 17, sub-s. 1: "No information with respect to any particular undertaking . . . . shall, without the consent of the owner of that undertaking, be included in any report laid before Parliament in pursuance of this Act or in any recommendations of an Agricultural Marketing Reorganisation Commission published in pursuance of this Act."

Sub-s. 2: "Any person who discloses any information obtained by him in the exercise of any power conferred on him by or under the provisions of this Act relating to polls, or in the exercise of any power conferred by or under this Act on any board, consumers' committee, committee of investigation, or Agricultural Marketing Reorganisation Commission, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine not exceeding one hundred pounds or to both such had received the whole product of the seed potatoes supplied by him and that the potatoes of the same variety delivered to other merchants were grown in another field of the plaintiff's. Judgment was accordingly given for the plaintiff for the amount claimed.

The defendant appealed.

Pritt K.C. and *Elborne* for the appellant. The county court judge was wrong in holding that the return was privileged from production. Sect. 17, sub-s. 2, of the Agricultural Marketing Act, 1931, cannot be construed as preventing the production of the return in criminal proceedings, and we submit that it cannot be excluded in civil proceedings where its production affords material evidence on the point in dispute. The return having, as we say, been wrongly rejected, there should be a new trial.

Croom-Johnson K.C., *Gerald A. Gardiner* and *A. M. Wallace* for the respondent. The county court judge was right in holding that the return was privileged from production. Where a document is not produced when the proper steps have been taken to procure its production, and have failed, the remedy of the party wishing its production is to give secondary evidence of its contents. No step of this nature was taken by the appellant. But even assuming that the county court judge was wrong in his view that the return was privileged from production, there has been no substantial wrong or miscarriage. There was abundant evidence before the judge entitling him to find which of the respondent's fields were planted with the particular variety of potatoes, and on that

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imprisonment and fine, or on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding fifty pounds or to both such imprisonment and fine.

Provided that nothing in this section shall apply to the disclosure of any information in so far as it is required to be disclosed for the purposes of legal proceedings (including arbitrations) under this Act or any scheme made thereunder, or for the purpose of any report of such proceedings, or in so far as the disclosure is required or authorised by this Act, or any scheme made thereunder."

C. A.
1936

ROWELL
v.
PRATT.

evidence he was satisfied that the appellant received the whole crop to which by the contract he was entitled.

Cur. adv. vult.

May 15. The following judgments were read :—

GREER L.J. The respondent, a farmer in a part of Lincolnshire where potatoes are largely grown, claimed against the appellant money due for potatoes delivered by him pursuant to an agreement made with the appellant. There was no defence to the respondent's claim, but the appellant, who is a merchant dealing in potatoes, put in a counterclaim alleging that the respondent had in breach of his contract delivered to other buyers some of the potatoes which under his agreement he was under obligation to deliver to the appellant, and claiming damages in respect of such wrongful deliveries. For convenience I will refer to the respondent as " the farmer," and to the appellant as " the merchant."

The prevailing custom in the district in which the two parties carried on their business was for merchants to supply seed potatoes sufficient for an agreed acreage, and when they did so they were entitled to all the potatoes grown from their seed upon the agreed acres. In this case the merchant and the farmer agreed that the merchant should supply to the farmer sufficient seed to be planted in 9½ acres in two parts of a field marked " C " on the plan which was used at the trial. The merchant in order to sustain his counterclaim had to establish that some of the potatoes grown on the 9½ acres had been delivered otherwise than to himself. He was able to show that potatoes of the agreed kind, that is to say, " Royal Kidney " potatoes, had been so delivered; but the farmer alleged, and called a considerable quantity of evidence to prove, that he had planted Royal Kidney potatoes in another 4 acres, and this accounted for any deliveries he had made of Royal Kidney potatoes otherwise than from those to which the merchant was entitled. If this was true the counterclaim necessarily failed.

Under the Scheme made under the Agricultural Marketing

Acts, 1931–33, regulating the marketing of potatoes, the Marketing Board had the right to require from producers such estimates, returns and other information relating to potatoes as the Marketing Board might specify (see reg. 76 of the Scheme), and by reg. 79 any producer failing to comply with any demand or requirement made by the Board, or making a false statement, would become liable to such penalty as might be imposed by the Board not exceeding *20l.* [The Lord Justice read s. 17 of the Agricultural Marketing Act, 1931, and continued:] We were provided with a form showing the information which the Marketing Board required from producers of potatoes. In this form all producers of potatoes were required to state (inter alia) the number of acres of Royal Kidney potatoes planted by them. The farmer made a return in the prescribed form but kept no copy of it. If the return showed that only 9½ acres of Royal Kidney potatoes had been planted by the farmer, such a document would be evidence against him that he had no Royal Kidney potatoes except those which were planted in the 9½ acres, and accordingly if it was proved to the satisfaction of the Court that he delivered potatoes to dealers other than the merchant, that could only be explained either by saying that his return was a false one, or by holding that his deliveries to other people came from the 9½ acres to the produce of which the merchant was entitled. It was accordingly of importance to the merchant to obtain, if possible, the production at the trial of the return made by the farmer to the Marketing Board. Before the case came on for hearing in the Wisbech County Court, the merchant, in the hope that he might thereby support his counterclaim, served a subpœna duces tecum on the Secretary of the Marketing Board to produce the form. The Secretary, apparently with the authority of the Board, brought the return into the precincts of the Court but did not produce it. The Marketing Board sent their solicitor to appear and contend that the Secretary was not bound to produce the document. Counsel for the merchant asked the judge to make an order for the production of the return, and the question involved in the appeal is whether the judge was wrong in law in refusing to make the order.

The subpœna duces tecum had been obtained by the merchant's agents for the purpose of procuring the production of the document to his counsel and solicitor at the hearing. If an order was made for the production of the document and it was accordingly produced, this would not have made it evidence in the case. The merchant's counsel would have been entitled to look at it and decide whether he would or would not put it in evidence. Just as in the case of a subpœna ad testificandum the party obtaining and serving the subpœna would not be bound to put the witness in the box. In my opinion, in a proper case the judge at the trial would have power to order the production of a document in respect of which there had been a subpœna duces tecum: see *Amey* v. *Long*. (1) It was there held that the writ of subpœna duces tecum is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge. In *Miles* v. *Dawson* (2), an action for trespass for taking the plaintiff's ship, Lord Kenyon refused to make an order for production of a power of attorney from the defendant to the person who had taken possession though the latter had been served with a subpœna duces tecum in respect of the power of attorney. In *Bateson* v. *Hartsink* (3) the solicitor to the assignees of a bankrupt was held by Lord Kenyon not bound to produce the bankruptcy proceedings. The learned Lord Chief Justice said that the solicitor was not bound to produce the proceedings because it would be criminal for him to do so, as they were not his papers but those of his clients, the assignees of the bankrupt's estate. Accordingly it has frequently been held that if a witness who has been subpœnaed to produce documents of which he has on behalf of an employer or principal the physical possession or custody, he cannot be ordered to produce them if he is forbidden

(1) (1808) 9 East, 473.
(2) (1795) 1 Esp. 405.
(3) (1801) 4 Esp. 43.

to do so by his employer or principal: see the cases to this effect which are cited in Halsbury's Laws of England, 2nd ed., vol. 13, p. 738. I need not refer further to the cases; I have read them all and the rule is well accepted.

It seems to me clear from the stand taken at the hearing in the county court by the solicitor for the Board that the Board were withholding their consent to the production of the document by their Secretary. Further the county court judge was, I think, right in treating s. 17 of the Agricultural Marketing Act, 1931, as a statutory prohibition of the disclosure of the information contained in the farmer's return to the Board. There could not be a more effective way of prohibiting the disclosure than by enacting that such disclosure should render the person making it liable on conviction on indictment to imprisonment. It may be true that if the judge had made the order the Secretary would have had a good defence to an indictment under s. 17, but in my judgment it would have been wrong for the judge to make an order involving the disclosure of information when it would have been criminal on the part of the person guilty of such disclosure if it were made without an order of the Court.

The view that I take of s. 17 is that the first part of the section impliedly prohibits the disclosure of any information received by the Board to either of the parties to any litigation. This view explains why it was considered necessary by the Legislature to say in the latter part of sub-s. 2 of s. 17 that the section should not be read as a prohibition of the disclosure of such information for the purposes of legal proceedings under the Act. This part of the sub-section was necessary in order to answer any contention that sub-s. 2, if there had been no proviso, would have prohibited the use of such information in proceedings under the Act. If and in so far as s. 17 was intended to protect, amongst other people, the producers who were obliged by the Scheme to give information to the Board from having the information so given disclosed to their rivals in trade or any other person who might use it for the purposes of legal proceedings against them, the proviso in the second part of sub-s. 2 was necessary to make it quite clear that the prohibition contained in the first part of the sub-section was not to be applied to legal proceedings under the Act or any Scheme made thereunder. The protection afforded to producers giving information to the Board by filling in the form would not have been very useful if it could always be rendered nugatory by any person who wanted disclosure bringing an action against the producer for an alleged breach of contract or for tort and serving the Secretary of the Board with a subpœna duces tecum to produce the document containing the information. Further, a disclosure in Court would do the producer much more harm than a disclosure out of Court. The production in a public Court of the document would have been disclosure not merely to one of the litigating parties but to everybody present in Court, and, through the newspapers, probably to all the producer's competitors in the potato trade.

For these reasons I am of opinion that the refusal of the learned county court judge to make an order for the disclosure of the document was not a mistake in law or a misdirection of himself which would justify this Court in ordering a new trial.

Further, it was contended in the appeal on behalf of the farmer that there had been no miscarriage of justice, because even if the return had shown that the farmer had only returned 9½ acres as planted with Royal Kidney potatoes, the independent evidence of seven witnesses would clearly have established that he had planted the additional 4 acres with regard to which the merchant was not concerned, and that the only reasonable conclusion which, having regard to this overwhelming evidence, the judge could have come to if the return only showed 9½ acres would have been that for some reason or other the farmer had misstated in his return the acreage planted with Royal Kidney potatoes. I think this argument is well founded. In my judgment this appeal should be dismissed with costs on the grounds above stated, but inasmuch as my brethren think otherwise the order will be as they decide.

Slesser L.J. In this case, which raises a question of

C. A.
1936

ROWELL
v.
PRATT.

Slesser L.J.

some constitutional importance, the plaintiff claimed the sum of 98*l*. for potatoes sold and delivered by him to the defendant. The defendant, in substance, admitted the claim but raised by counterclaim the complaint against the plaintiff that he had agreed by two contracts in writing, dated January 6, 1934, and March 31, 1934, to grow for the defendant 9½ acres of potatoes and deliver the whole of the proceeds of the land to the defendant at 2*l*. 10*s*. per ton, but that, in breach of his contractual obligations, the plaintiff had not delivered to the defendant the whole product of the 9½ acres, but had wrongfully sold some 44 tons of potatoes to a company known as Pattullo Higgs & Co. at a higher price than that at which he had contracted to sell to the defendant.

In these circumstances, as the learned county court judge says, the main issue in the case was whether or not the plaintiff had planted Royal Kidney potatoes in a certain field on the plaintiff's farm in addition to those planted on the 9½ acres referred to in the contract. If he did, it was taken that such planting would sufficiently account for the potatoes sold to Messrs. Pattullo Higgs & Co., in which case, such potatoes being grown outside the contractual area, it would be strong evidence that the plaintiff had not broken his contract notwithstanding that he admitted that he had sold a substantial amount of potatoes to Messrs. Pattullo Higgs & Co.

The learned county court judge came to the conclusion that these potatoes were grown in a field of the plaintiff not included in the contract with the defendant and gave judgment for him on the claim and counterclaim.

The appeal in this case is based upon the complaint that, in considering where the plaintiff in fact planted these potatoes, the learned county court judge wrongfully rejected material evidence which the defendants wished to place before him. That evidence was contained in a return by the plaintiff made to a body known as the Potato Marketing Board set up under the Agricultural Marketing Act, 1931, which, it was said, would show whether the plaintiff had made a return with regard to the total acreage of potatoes planted in his various fields.

C. A.
1936

ROWELL
v.
PRATT.

Slesser L.J.

The return sought to be adduced asked among other questions the following very relevant one: "What is the total acreage of potatoes planted this year on all the land in your occupation in Great Britain?" It is clear that the answer might have been very material to a determination of a principal issue in the case, for, if the answer were 9½ acres, it would go greatly to assist the defendant's contention that the potatoes sold to Messrs. Pattullo Higgs & Co. were raised on land which was the subject of the contract between him and the plaintiff, whereas if the return were a larger acreage it might well go to support the plaintiff's story. In either case, in my view, it is not possible to say that the answer would not be an important one for the judge to consider, nor can I think that, if he has wrongly rejected the evidence, such rejection would not cause a substantial wrong or miscarriage of justice within the meaning of Order xxxix., r. 6.

In asking the learned county court judge to refuse to look at the return, it was not suggested, nor is it suggested here, that any privilege attaches to the Potato Marketing Board by reason of its being a Government Department. A communication to a Government Department is protected from production, as being a State secret, if the Minister or head of the Department sees fit to claim such protection for it. The Minister to whose Department a document belongs or the head of the Department in whose custody it is, is the exclusive judge whether or not that document is protected from production on grounds of State policy, and if he claims such protection the Court will not go behind the claim if the objection that the document is protected from production as being a State document is taken by the proper officer of the Government himself, the Minister or head of the Department: see *Beatson* v. *Skene*. (1) In that case Pollock C.B. speaks of the production of a State paper being injurious to the public interest.

The latest case in this Court on the point is that of *Ankin* v. *London & North Eastern Ry. Co.* (2), in which case it was held that a copy of a report of an accident supplied to the Minister of Transport under a statute was privileged on a

(1) (1860) 5 H. & N. 838, 853.

(2) [1930] 1 K. B. 527.

statement of the Minister that a production of the document would be contrary to the public interest.

In the present case, it is not possible to say either that the Potato Marketing Board is a Government Department or that a return made to them under the Agricultural Marketing Act, 1931, is a State paper in the language of Pollock C.B. The Potato Marketing Board is constituted under s. 2 of the Agricultural Marketing Act, 1931, under a Scheme submitted to the Minister for regulating the marketing of an agricultural product by the producers thereof (s. 1, sub-s. 1), and by Sch. I., Part I., it is provided that a Scheme may be submitted by any persons who satisfy the Minister that they are sufficiently representative of the persons who produce the product in the area to which the Scheme is applicable. So far, therefore, from the Marketing Board being a Government Department, its statutory powers, which require a poll of the registered producers to be taken (s. 3), as well as the approval of the Minister, and many other protections that the Scheme be representative of the industry, all point to its voluntary nature, albeit it is, in a sense, the creature of legislation.

Doubtless these difficulties were before the mind of the representative of the Potato Marketing Board, Mr. Greenwood, when, on their behalf, he based his refusal to produce the return under the subpœna to the appellant solely on a section of the Act itself, that is s. 17, and in terms disclaimed the contention that it was contrary to public policy to disclose the document. He even went so far as to say that the Board was perfectly willing to disclose the document with the consent of the person making the report, that is the respondent. No such consent, however, was given, and the learned county court judge held that the document in question was privileged and need not be produced. This the judge did on the basis that he had no power to order production of the document in Court under the subpœna duces tecum, not on any narrow ground that he was deciding on the validity of the excuse offered for not producing it that it would tend to criminate the witness, but because, to use his own words, " it was privileged."

In so ruling, I think that the learned county court judge was wrong. The only ground on which he was asked to act and did act was the provision contained in s. 17, sub-s. 2, of the Agricultural Marketing Act. [The Lord Justice read the sub-section and continued:] There can be no doubt that, at common law, material evidence of this kind could not properly be rejected. Whether the particular evidence sought to be adduced was oral or whether it was to be obtained by process of discovery of documents, by interrogatory or by the process of subpœna duces tecum, if the entirely general contention which has found favour with the judge be correct, the giving of such evidence, by whatever method, would involve the disclosure of information by a servant of the Board and could be all similarly resisted. I do not distinguish, therefore, between one class of evidence and another, nor do I think any material difference can be found in the manner in which it is sought that the evidence should be placed before the Court. It is a common law right to obtain for the information of the Court what the appellant believes to be material evidence, and it is essential to the determination of justice that the Court should be possessed of it. The right to require the admission of oral evidence is at least as old as the sixteenth century, for a statute of 1562 (5 Eliz. c. 9) compelled attendance of witnesses by methods not dissimilar to the modern process of subpœna, a method which had always been used in the Chancery, and, by the end of that century, a body of law had developed both as to documentary and oral testimony which makes it certain that the right to give and duty to receive material evidence had, beyond question, become a part of the common law. The subpœna in the name of the King commands the witness to attend to give evidence, and disobedience, if wilful, is punishable by attachment: see 3 Blackstone's Commentaries, p. 369; see also s. 4, sub-s. 2, of the Criminal Evidence Act, 1898, which speaks of the case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

In these circumstances, I ask myself whether the language of s. 17 is apt to destroy this fundamental common law right and duty. In my view, it is not. In the case of privilege claimed by a Government Department, as I have pointed out, the Minister may, in appropriate cases, consent to the production of a document; in the present case, if the learned county court judge is right, it would similarly be a criminal offence to give the evidence whether the Potato Marketing Board consented to the production of the return or whether the person making the return gave his consent. Moreover, if the evidence were received by the Court, and the section applied to such reception, the free giving of that evidence might be a crime, and the law will not readily assume that the doing of an act by it otherwise permitted or acknowledged is a crime: see *Chester* v. *Bateson* (1), where an unsuccessful attempt was made under the Defence of the Realm Regulations to prevent access to the Courts on threat of criminal proceedings.

To protect or prevent a material witness from tendering his evidence, I think that clear unambiguous language in the statute relied upon is essential. "Statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare": *Arthur* v. *Bokenham*. (2)

In my view, the language of s. 17, sub-s. 2, produces no such result. I do not think that the opening words "Any person who discloses any information" are apt to deal with the case of a person giving evidence under legal process in a Court of law, and it is interesting to contrast the absence of any reference to evidence disclosed "in consequence of any compulsory process of any Court of law or of equity, in any action, suit, or proceeding"—to quote s. 85 of the Larceny Act, 1861—with the express provision in s. 103 of the Land Titles and Transfer Act, 1875, that "nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer in any legal proceeding, or to answer any question or interrogatory in any civil proceeding, in any Court of law or equity, or in the Courts of bankruptcy; but

(1) [1920] 1 K. B. 829.

(2) (1707) 11 Mod. 148, 150.

no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding under this Act" : see also the Bankers' Books Evidence Act, 1879, s. 6, where it is provided in terms that "A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause." The Companies Act, 1929, s. 314, sub-s. 2, dealing with the production of documents kept by the registrar, is to the like effect.

In *Lee* v. *Birrell* (1) the clerk to the Property Tax Commissioners was held bound to produce in a Court of justice his official books, though he had been sworn on entering office not to disclose anything he should learn without the consent of the Commissioners or by force of an Act of Parliament. Lord Ellenborough said : "I clearly think the oath contains an implied exception of the evidence to be given in a court of justice in obedience to a writ of subpœna." This case is consistent with *In re Joseph Hargreaves*. (2)

Finally, the respondent relied upon the proviso to s. 17, sub-s. 2, of the 1931 Act. That proviso is dealing with the disclosure of information for the purpose of or for any report of legal proceedings, that is, not in legal proceedings themselves, but in their institution, preparation or record. In so far as it is any aid to construction in the present case, I think the proviso is in favour of the appellant, for it goes to show that the Legislature has seen fit to protect information gathered for the purpose of the preparation of legal proceedings under the Act and has guarded against the difficulty which would otherwise arise if the Board were precluded through disclosure of information being penal from performing their duties in so far as they may require litigation under this Act.

There is no other reference in the section to legal proceedings, and the doctrine "expressio unius est exclusio alterius"

(1) (1813) 3 Camp. 337.

(2) [1900] 1 Ch. 347.

cannot here be applied in the manner sought by the respondent.

The legislation here to be considered is not dissimilar to that of the Official Secrets Act, 1911 and 1920, which make it illegal to communicate certain information other than that authorized to be communicated (Act of 1911, s. 2, sub-s. 1 (*a*)). By s. 6 of the 1920 Act it is made the duty of persons on demand to give information relating to such offences and by s. 8, sub-s. 4, of the same Act, if it appears that the publication of any evidence would be prejudicial to the national safety, the public may be excluded. It is assumed, apparently, notwithstanding the prohibition of communication of information in the 1911 Act, that such information may be given in evidence among other matters in a Court of law.

This appeal succeeds and a new trial must be ordered between the parties, the costs of this appeal to be the appellant's, and the costs of the first trial to abide the decision of the second.

GREENE L.J. The substantial question raised by this appeal is whether or not the learned county court judge was right in holding that a return of acreage under potatoes made by the plaintiff to the Potato Marketing Board was a privileged document. The return in question was called for by the Board and made by the plaintiff as a registered producer pursuant to cl. 76 of the Potato Marketing Scheme, which is given statutory force by s. 1, sub-s. 8, of the Agricultural Marketing Act, 1931. Under cl. 79 of the Scheme a registered producer who fails to make a return when called for, or knowingly makes a false statement therein, is liable to a monetary penalty. By the form of return in use by the Board the plaintiff was required to state the acreage planted by him with each variety of potatoes, including Royal Kidney potatoes. The acreage which by the contract between the plaintiff and the defendant the plaintiff undertook to plant with Royal Kidney potatoes was some 9½ acres, and if this was the only acreage planted with that variety it would follow that the Royal Kidney potatoes delivered by the plaintiff to another firm must have come from the 9½ acres to the whole produce of which the defendant under his contract was entitled. The evidential importance of the return is therefore manifest. It is alleged by the plaintiff that the Royal Kidney potatoes delivered by him to the other firm were grown in some 4 acres situated in a different field. If this allegation is true, it would follow that the acreage figure in respect of Royal Kidney potatoes inserted in the return ought to have been 13½ acres. On the other hand, if the allegation is not true, the correct figure would be 9½ acres. It does not of course follow that even if the figure inserted by the plaintiff in the return turned out to be 9½ acres the defendant would necessarily succeed, since the plaintiff might be able to satisfy the judge that an incorrect figure was inserted either intentionally or by inadvertence. Nevertheless, the return would afford very important documentary evidence, indeed it is the only documentary evidence available on this issue, since the plaintiff kept no copy of the return or any other written record.

It was argued that even if the learned county court judge was wrong in holding that the return was privileged nevertheless a new trial ought not to be ordered in view of the fact that the plaintiff's evidence as to the planting of the 4 acres with Royal Kidney potatoes was corroborated by a number of witnesses and that even if the return had shown 9½ acres only as planted with Royal Kidney potatoes the result of the trial would have been the same. I am unable to take this view. The value of such a piece of documentary evidence is not to be tested by treating it merely as something thrown into the scales. The effect of its production on the plaintiff's evidence and on the evidence of the witnesses who supported him must be considered, and it may very well be that it might have led to admissions by the plaintiff which would have compelled the learned county court judge to disregard the evidence of the other witnesses, if indeed they had still stood by the evidence which they gave.

I turn now to the question of privilege, which is one of importance. It was not argued that the case falls under any of the recognized heads of privilege. Indeed it could not in my opinion be so argued. The Potato Marketing Board is not a Department of State. On the contrary, the Scheme of the Agricultural Marketing Acts is to set up machinery for self-government in the industry affected, and the Board is nothing more or less than a domestic executive body which the Legislature has thought fit to entrust with statutory powers. If, therefore, a document in the hands of the Board, as the report in question was in this case, is privileged it can only be by virtue of statutory provision, and it is upon statutory provision alone that the argument is based.

The provision in question is contained in s. 17, sub-s. 2, of the Agricultural Marketing Act, 1931. I need not set out its terms. Its effect is to make guilty of an indictable offence any person "who discloses any information obtained by him" in the exercise of powers conferred by or under the Act, with a proviso excluding the application of the sub-section (as well as that of sub-s. 1) to disclosure of information "in so far as it is required to be disclosed" for certain specified purposes including "the purposes of legal proceedings (including arbitrations) under this Act." The language of the sub-section is open to the following preliminary observations: (1.) The words creating the offence make no reference to production of documents or the giving of oral testimony in legal proceedings. (2.) The sub-section contains no saving for the case where the owner of an undertaking consents to disclosure, as is the case in sub-s. 1, and if the respondent's argument is correct the result would be that even if the Board and the person who supplied the information both agreed it would not be permissible for the judge to look at a document containing it or to hear oral testimony relating to it. (3.) If the respondent's argument is correct, the privilege would extend to criminal as well as civil proceedings since the language used does not permit of any implied exception in criminal proceedings.

I find myself unable to construe the language of the sub-section as doing more than to impose an obligation of secrecy on those who by virtue of the legislation obtain information which the Legislature considers ought to be treated as confidential in character. The production of documents and the giving of oral testimony in legal proceedings stand in a category by themselves, and the special and distinct nature of that category demands in my opinion special and appropriate language to cover it. Privilege is governed by well settled principles, and the Courts have always jealously safeguarded their powers of compulsion against encroachments by claims of privilege. A recent example is to be found in the decision of the Privy Council in *Robinson* v. *State of South Australia.* (1) The expression "discloses any information" simpliciter in such a context as the present is in my judgment inapt to cover the case of a person who under legal compulsion produces a document or gives oral testimony in legal proceedings. The appropriate language to use if it were desired to cover these matters would in my judgment have been language providing that the possessor of the information should not be compellable to produce any document containing it or to answer any question relating to it in any legal proceedings.

It may be suggested that the exception contained in the proviso for cases where disclosure is required "for the purpose of legal proceedings (including arbitrations) under this Act" indicates that production is not to be permissible in any proceedings other than proceedings under the Act. In my judgment the proviso points to an opposite conclusion. The saving is not for disclosure "in" legal proceedings under the Act but for disclosure "for the purposes of" such proceedings. This appears to me to give the key to the meaning and object of the proviso and thereby to confirm the view which I have expressed as to the meaning of the sub-section. The Act provides for the bringing of legal proceedings by the Board (for example, s. 6, sub-s. 1 (*c*)) and for arbitrations between the Board and producers (s. 6, sub-s. 1 (*d*)). If the proviso were not there, the Board or its officers would be committing an offence if, for the purpose of the proceedings, they disclosed information, for example, to solicitors or counsel whom it was desired to instruct, or to expert witnesses whom it was desired to call. The fact that an exception is made and has to be made for this purpose appears to me to show that the sub-section is only intended to provide for the ordinary obligation of secrecy.

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(1) [1931] A. C. 704.

During the argument I asked counsel on both sides whether they could refer to any statutory provision which in terms provided that a particular kind of document should be privileged from production, but they were unable to do so. My own researches have not produced any results of great importance, but for what they are worth I will state them. The Bankers' Books Evidence Act, 1879, provides by s. 6 that a banker shall not in any legal proceedings to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under the Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by an order of the judge. The Companies Act, 1929, s. 314, sub-s. 2, provides that no process for compelling the production of any document kept by the registrar shall issue from any Court except with the leave of that Court. It is right to observe that both these provisions are consequential upon provisions providing for proof of the documents concerned by means of copies and an express reference to the production of originals was therefore necessary. But the language used may, I think, be referred to as showing what words are appropriate for dealing with the special matter of production of documents and the giving of oral testimony in legal proceedings. Similar observations apply to s. 1 (*f*) of the Criminal Evidence Act, 1898.

The Income Tax Act, 1918, contains in Sch. IV. forms of declaration to be made by Commissioners, Surveyors and others. If I may take the Surveyors' declaration, it is to the effect that the declarant " will not disclose any particular contained " in any statement, return, etc., " or any evidence or answer given by any person who shall be examined . . . . except to such persons only as shall act in the execution of the said Act, and where it shall be necessary to disclose the

C. A.
1936

ROWELL
v.
PRATT.

Greene L.J.

same to them for the purposes of the said Act or to the Commissioners of Inland Revenue, or in order to, or in the course of, a prosecution for perjury committed in such examination, affidavit or deposition." I do not think that this language, which is not dissimilar to that used in the present case, covers the case of production of documents or the giving of oral testimony in legal proceedings. The documents and the information are entitled to privilege on a different ground—namely, that they are official matters the disclosure of which would be against the public interest, provided, of course, that the claim to privilege on this account is made in the proper way by the responsible head of the Department. The matter is discussed in the introduction to Dowell's Income Tax Laws (9th ed.), pp. cxli. to cxlv. In the case of *In re Joseph Hargreaves* (1), to which Slesser L.J. has called my attention, an application was made under s. 115 of the Companies Act, 1862 (now s. 214 of the Companies Act, 1929), for an order on a surveyor of taxes to attend for examination and produce documents. The application was resisted by the surveyor on two grounds—namely, that to produce the documents would be a violation of his oath (by which I assume is meant the declaration) and that production would be against public policy. In support of the latter ground an affidavit by the Secretary to the Commissioners for Inland Revenue was produced. Wright J. refused the application on this latter ground alone and no reference is made to the oath either in his judgment or in the judgments of the Court of Appeal. It does not even appear to have been argued by counsel that the oath on its true construction applied to production of documents in legal proceedings.

The last reference which I desire to make is to s. 212 of the Income Tax Act, 1918, which protects assessors, collectors and others from being called upon by assessment committees for copies of or extracts from certain specified documents, and it goes on to provide that "nor shall any such person be required to attend before any such committee to produce any such assessment, rate, rate book or document, or to be examined concerning the same."

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(1) [1900] 1 Ch. 347.

For the sake of completeness I may mention that a provision very similar to that now in question is contained in s. 8 of the Coal Mines Act, 1930. My opinion is that if the Legislature had intended in these cases to create a new form of statutory privilege it would have said so in clear language, using words appropriate to cover the production of documents and the giving of oral testimony in legal proceedings.

I concur in the order proposed by Slesser L.J.

Appeal allowed.
Order for new trial.

Solicitors for appellant: *Burton, Yeates & Hart, for Southwell, Dennis & Farrow, Wisbech.*

Solicitors for respondent: *Metcalfe, Copeman & Pettefar.*

J. S. H.

1936
Mar. 17, 18.

ATTORNEY-GENERAL *v.* COHEN AND ANOTHER.

Revenue—Stamp Duty—Conveyance on Sale—Sale by auction to same purchaser of land in several lots from same vendors—Series of transactions—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 73.

At a public sale by auction of dwelling-houses offered in twelve lots, the defendants bought six lots at prices in two cases exceeding 500*l.* and in four cases not exceeding 500*l.* per lot, but in the aggregate exceeding 500*l.* Six contracts of sale were signed by the defendants, each separately stamped, six deposits paid and six separate abstracts of title supplied, in respect of the six lots so purchased:—

Held, that each sale did not form part of a larger transaction or of a series of transactions in respect of which the aggregate amount or value of the consideration exceeded 500*l.* within the meaning of s. 73 of the Finance (1909–10) Act, 1910, and, therefore, that in the four cases where the consideration did not exceed 500*l.* the double tax thereby imposed was not payable.

SPECIAL CASE stated by consent under Order XXXIV., r. 1, and Order LXVIII., r. 2, proceedings having been commenced by writ of subpœna whereby the informant claimed a penalty under s. 5 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

At a public auction held at Newcastle-upon-Tyne on September 27, 1934, certain dwelling-houses and other premises were offered for sale in twelve separate lots belonging to different vendors. At the auction the bids of the two defendants in respect of lots 3, 4, 5, 6, 7 and 8, all of which belonged to the same vendors, were accepted. The defendants' bids were made in respect of each of the lots separately, and each of the said lots was separately sold to the defendants. Lots 6 and 8 were each sold for more than 500*l.*, the remaining lots 3, 4, 5 and 7 being sold for less than 500*l.* each. Six separate formal contracts of sale in respect of the six separate lots respectively were signed by the defendants, and six deposits of 10 per cent. of the purchase price of each were paid by them. Each of the six contracts of sale was separately stamped. Six separate abstracts of title were supplied by the vendors to the defendants' solicitors.

By s. 73 of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8): "The stamp duties chargeable under the heading 'Conveyance or Transfer on Sale of any Property' in Sch. I. to the Stamp Act, 1891 (in this Part of this Act referred to as the principal Act), shall be double those specified in that schedule: Provided that this section shall not apply to . . . . a conveyance or transfer where the amount or value of the consideration for the sale does not exceed 500*l.* and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds five hundred pounds."

Four separate conveyances of the said lots 3, 4, 5 and 7 (each under 500*l.*, but aggregating more than 500*l.*) were presented by the defendants to the Commissioners of Inland Revenue for stamping. Each conveyance contained a certificate that the transaction did not form part of a larger transaction or of a series of transactions within the meaning of s. 73.

The question for the Court was whether each of the said four transactions formed part of a larger transaction or of a series of transactions so as to be liable to the double duty specified in the said section.

Sir Donald Somervell S.-G. and *J. H. Stamp* for the informant. The question is as to the meaning of the words "series of transactions" in s. 73 of the Finance (1909–10) Act, 1910. There is no authority on the point. The definitions in the Oxford Dictionary are of no assistance. One speaks of a series of publications or of accidents, and the word has a wide connotation when used to denote a series of events. It is submitted that it applies to any succession of events which can be grouped together by means of some common element. The present transactions have one or more common elements. They all took place on the same day, at the same auction, between the same parties and related to subject-matters of the same character. It is submitted that it is from the point of view of the taxpayer, that is to say the purchaser (see s. 15, sub-s. 2 (*d*), of the Stamp Act, 1891), that transactions should constitute a series. These were all conveyances on sale, and were not so divided by time as to lose their character of being a series. The object of the Act is to benefit the less well off, as is shown by the exemption from its operation of amounts not exceeding 500*l*. But the respondent is not in that category, being able to invest some 2000*l*. The whole transaction constituted one investment in house property.

Laski K.C. and *A. M. Hurwitz* for the respondent. These lots were advertised for sale by private treaty and, failing that, by auction. The case contemplated by the Act is this: X, a landowner, has an estate for sale, and divides it into twenty lots. Y, attracted by his advertisement, determines to buy by private treaty, but will only do so if he can get the whole. He says: "I will treat for each lot separately; some will exceed 500*l*. in price and some will not, but I must have the whole." That would be within the Act. But if Y attended the auction the case would be different. He has to bid separately for each lot, and the price of each depends on the volition of other potential purchasers and he may be outbid in some cases, and finally he may find himself the owner of a different set of lots from that originally contemplated. Each purchaser would have a complete right of action after being declared the purchaser of a lot—per Mansfield C.J. in *Emmerson* v. *Heelis* (1)—without reference to any other purchases of the lots. In the case mentioned turnips were sold at auction in separate lots to an aggregate value exceeding 20*l.*, an amount which demanded an agreement stamp. But each lot was sold for less than 20*l.* It was held that a distinct contract arose for each lot, and that no stamp was necessary. See also *Roots* v. *Lord Dormer.* (2)

[*James* v. *Shore* (3); *Baldey* v. *Parker* (4); *Lewin* v. *Guest* (5); *Casamajor* v. *Strode* (6); *Chambers* v. *Griffiths* (7); and *Holliday* v. *Lockwood* (8) were also referred to.]

The Act was aimed at the splitting up of one transaction into many in order to avoid tax. But these transactions never were one transaction; there is no interdependence between them. The present case is a fortiori the case of *Kimbers & Co.* v. *Inland Revenue.* (9)

Sir Donald Somervell S.-G. in reply. It is conceded that each sale at the auction was a separate transaction, but, in the circumstances, each was part of a series of transactions. This point could not arise in *Kimbers'* case (9), for in that case one transaction was a conveyance on sale, while the other was a contract to build, and s. 73 only deals with conveyances on sale. The question decided in that case was whether there was one transaction or two.

LAWRENCE J. The question I have to decide is: What is the meaning of s. 73 of the Finance (1909–10) Act, 1910, as applied to the circumstances of this case, in which the

(1) (1809) 2 Taunt. 38, 45–46.
(2) (1832) 4 B. & Ad. 77.
(3) (1816) 1 Stark. 426.
(4) (1823) 2 B. & C. 37.
(5) (1826) 1 Russ. 325.
(6) (1834) Cooper temp. Brough., 510.
(7) (1794) 1 Esp. 150.
(8) [1917] 2 Ch. 47.
(9) [1936] 1 K. B. 132.

defendants attended an auction on September 27, 1934, and at that auction made separate bids for separate lots which were offered there in respect of dwelling-houses and other premises—namely, lots 3, 4, 5, 6, 7 and 8, all of which properties belonged to the same vendor, as it turned out. The defendants' bids were accepted and each of the six lots was separately sold to the defendants, and of those six lots four were sold for sums less than 500*l.*

The question is whether those four conveyances are to be stamped under the terms of s. 73 of the Act of 1910 as forming part of a larger transaction, or of a series of transactions, for s. 73 is in the following terms: "The stamp duties chargeable under the heading 'Conveyance or Transfer on Sale of any Property' in the First Schedule to the Stamp Act, 1891 (in this Part of this Act referred to as the principal Act), shall be double those specified in that schedule: Provided that this section shall not apply to the conveyance or transfer of any stock or marketable security as defined by section one hundred and twenty-two of that Act, or to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed five hundred pounds and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds five hundred pounds." As I have said, in the case of four of these lots which were bought by the defendants at this auction, the instruments contained a certificate that they did not "form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds 500*l.*" Those instruments are now submitted, by agreement between the defendants and the Crown, for the opinion of the Court, under that section.

The contentions which have been made on behalf of the parties are these. The Solicitor-General contends that there are three essentials to constitute a series within the meaning of s. 73: the first is that it must be a series from the point of view of the taxpayer, and the taxpayer, he says, is the purchaser, as is shown by s. 15, sub-s. 2 (*d*), of the Stamp Act, 1891; in the second place, he says that the series must consist of conveyances on sale, and in the third place he says that the series must be at or about the same time; and he deduces that principally from the fact that the section provides for a certificate in the instrument that the transaction does not form part of a series.

On the other hand, Mr. Laski, on behalf of the defendants, contends that "series" cannot be read in that wide sense, and that there must be, in the sort of series referred to in that section, some interdependence between the individual transactions which form the series. He has referred me to a number of cases which show that the buying of lots at auction constitutes separate contracts, and that they only relate to each other so as to be in equity one contract where there are circumstances known to both parties at the time of the auction which show that the bids of the purchaser were dependent upon his obtaining a good title to the other lots. In that connection he has cited the cases of *Emmerson* v. *Heelis* (1); *James* v. *Shore* (2); *Baldey* v. *Parker* (3); *Lewin* v. *Guest* (4); *Roots* v. *Lord Dormer* (5); *Casamajor* v. *Strode* (6); and *Holliday* v. *Lockwood.* (7) He has also relied upon the judgment of Finlay J. in *Kimbers & Co.* v. *Inland Revenue.* (8)

In my judgment, having regard to the object of the section, which is in my view to prevent evasion of the duty, the word "series" of transactions must be given some limitation other than the limitation which the Solicitor-General puts upon it, that it must be a series taking place at or about the same time. It is true that the word can be used in that wide sense, and it seems to bear in its original meaning merely the meaning of succession; but I do not think that the mere fact that a particular purchaser enters into two or more conveyances on sale at or about the same time,

(1) 2 Taunt. 38.

(2) 1 Stark. 426.

(3) 2 B. & C. 37.

(4) 1 Russ. 325.

(5) 4 B. & Ad. 77.

(6) Cooper temp. Brough., 510.

(7) [1917] 2 Ch. 47.

(8) [1936] 1 K. B. 132.

constitutes a series of transactions for the purposes of this section. According to the Solicitor-General's argument, the vendors may be different. The land conveyed may be in different parts of the country, and the only identities are the identity of the purchaser and the identity in point of time.

In my judgment, an auction raises somewhat different considerations from a conveyance on sale by negotiation; it may be that a number of conveyances on sale negotiated between two parties privately, at or about the same time, would constitute a series of transactions within the meaning of the section, but so far as it is important for me to express my view as to the general construction of the section, I should hold that there cannot be a series of transactions, unless there is some interdependence between the various transactions. Whether or not there is such interdependence, depends upon the facts of each case. Where the lots have been bought at an auction, as in this case, and there is no evidence of circumstances known to the vendor and the purchaser which in any way connects the various lots and makes the bids of the purchaser dependent upon the bids for the other lots, I am of opinion that there is no series of transactions within the meaning of the section.

The case of *Kimbers & Co.* v. *Inland Revenue* (1), to which I have been referred, is in some ways a much stronger case than the present one, for there, although the contract for the sale of the land was conditional upon the contract for the building of the house, yet Finlay J. held that it was not a transaction which formed part of a larger transaction—at least, that is what I think he held, although the Solicitor-General has contended that what was really being decided there was whether the transaction was one transaction. He also contends that it could not be—and possibly he is right in this—part of a larger transaction, because he says that the transactions referred to in s. 73 must be conveyances on sale, and therefore he says it could not have been argued there that the contract to build the house formed part of a larger transaction, because that was not a conveyance on sale;

(1) [1936] 1 K. B. 132.

and perhaps that removes the real relevance of that case from the argument.

My judgment is that the fact that the parties are the same, the fact that the time is close, and the fact that the places which are the subject-matter of the various conveyances are contiguous, are matters of accident—casual matters which do not constitute a series within the meaning of the section; and I hold that there must be interdependence between the transactions to form a series, and that in this case there is no evidence of any interdependence, no evidence that the purchaser knew even that the vendor was the same, and the contiguity of the properties was not a matter which gave rise to the purchaser's bids in such a way as constituted them dependent upon each other.

I therefore answer the question in the negative, and judgment will be entered for the defendants.

Judgment for defendants.

Solicitor for informant: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Gale & Phelps, for Sebag Cohen & Co., Sunderland.*

W. L. L. B.

CROXFORD *v.* UNIVERSAL INSURANCE COMPANY, LIMITED.

[1935. C. 1077.]

C. A.
1936
Feb. 13, 14, 17, 18.

NORMAN *v.* GRESHAM FIRE AND ACCIDENT INSURANCE SOCIETY, LIMITED.

[1935. N. 737.]

Insurance (motor)—Third-party risks—Judgment recovered by third party against insured—Action under statutory provision by third party against insurer for amount of judgment—Certificate of insurance properly cancelled before coming into force of statutory provision—Proceedings against insured commenced before that event, but judgment obtained subsequently thereto—Declaration not obtained of

C. A.
1936

CROXFORD
v.
UNIVERSAL
INSURANCE
CO.
NORMAN
v.
GRESHAM
FIRE AND
ACCIDENT
INSURANCE
SOCIETY.

right to avoid policy—Effect—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 5—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 1, 3; *s.* 42.

Sect. 10 of the Road Traffic Act, 1934, is a section which makes insurers liable in the circumstances and under the conditions specified in the whole of that section, and not merely those specified in sub-s. 1. Therefore insurers may protect themselves from liability under sub-s. 1 of s. 10 if they comply with the conditions set out in sub-s. 3 and obtain a declaration that the policy was obtained by the non-disclosure of a material fact or by a representation of some fact which was false in some material particular, such action for a declaration being brought within three months after the commencement of the proceedings in the running-down action in which judgment was given.

In *Croxford's* case the running-down action was brought on August 3, 1934, and therefore the last day on which the insurance company could commence an action for a declaration was November 3, 1934; but s. 10 of the Act of 1934 did not come into operation until January 1, 1935, and therefore the insurance company could not have taken proceedings under sub-s. 3 of s. 10 to obtain protection under that section because at that time the section had not come into operation, and it did not have a retrospective effect.

In *Norman's* case it had been found as a fact that there was no contract of insurance between the insurance company and the assured at the time of the accident. The running-down action was brought on October 26, 1934, and therefore the three months within which the insurance company must bring their action for a declaration would expire on January 26, 1935:—

Held, that in neither case could s. 10 of the Act of 1934 be applied so as to make the insurance company liable.

Decision of Horridge J. in *Croxford's* case [1935] 2 K. B. 409 reversed.

CROXFORD AND OTHERS *v.* UNIVERSAL INSURANCE COMPANY, LIMITED.

APPEAL from a decision of Horridge J. in an action tried without a jury. (1)

By a policy of motor insurance executed on December 20, 1933, in accordance with the Road Traffic Act, 1930, the Universal Insurance Company, Ld. (hereinafter called " the defendants "), undertook to indemnify one Herbert Davison (hereinafter called " the insured ") against liabilities incurred by him to third parties in respect of a motor lorry, and by the terms of the policy the defendants had a right to avoid it on certain grounds.

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(1) [1935] 2 K. B. 409.

The defendants also delivered to the insured a certificate of insurance in the prescribed form pursuant to the Act of 1930, s. 36, sub-s. 5.

On June 9, 1934, Mr. John William Croxford was killed by reason, as alleged, of the negligence of the insured in the driving and management of the motor lorry.

By a letter dated June 29, 1934, from the defendants to the insured the defendants elected to avoid the policy on the ground of alleged misstatement or concealment of material facts by the insured, and requested the return of the certificate of insurance.

On July 12, 1934, the certificate of insurance was returned by the insured to the defendants and properly cancelled.

On July 31, 1934, the Road Traffic Act, 1934, received the Royal Assent.

On August 3, 1934, the widow, mother, and children of the deceased Mr. J. W. Croxford (hereinafter called "the plaintiffs") brought an action under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), against the insured, alleging that the death of the deceased had been caused by the negligence of the insured and claiming damages.

On January 1, 1935, Part II. of the Act of 1934, which comprised s. 10 thereof, came into force.

On February 6, 1935, the plaintiffs obtained judgment for 3000*l*. and costs in the action which they had brought against the insured.

On April 2, 1935, the plaintiffs, purporting to proceed under the Act of 1934, s. 10 (1), brought the present action against the defendants, claiming a declaration that the defendants were liable to pay to the plaintiffs the amount of that judgment with interest and costs and payment of the same.

(1) The Road Traffic Act, 1934, s. 10: "(1.) If, after a certificate of insurance has been delivered under sub-s. 5 of s. 36 of the principal Act" [Road Traffic Act, 1930] "to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (*b*) of sub-s. 1

The defendants in their amended defence stated (inter alia): (para. 1) that they denied that the insured was the holder of the certificate of insurance at any material time; (para. 2) that the policy was issued to the insured on the faith of a written proposal signed by the insured; and that the information in that proposal was incorrect in material

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of s. 36 of the principal Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2.) No sum shall be payable by an insurer under the foregoing provisions of this section—

(*a*) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;

. . . .

(3.) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto."

Sect. 42: "(3.) This Act shall come into operation on such day or days as the Minister may appoint, and the Minister may fix different days for different purposes and different provisions of this Act."

By the Road Traffic Act, 1934 (Date of Commencement) Order (No. 3) 1934, dated November 14, 1934, the Minister of Transport appointed and ordered that the provisions of the Act of 1934, Part II., in which s. 10 thereof is included, should come into operation for all purposes on January 1, 1935.

particulars, and that by the terms thereof and of the policy the defendants became entitled to avoid the policy; (para. 3) in the alternative the policy was voidable by reason of the concealment of material facts; (para. 4) that the defendants elected to avoid the policy, and that the certificate of insurance was returned by the insured; (para. 6) that the policy had been avoided and the certificate returned before the Act of 1934 was passed and before Part II. thereof came into force; (para. 7) that the plaintiffs' cause of action arose before that Act was passed or before Part II. thereof came into force; and (para. 9) that by reason of the premises the plaintiffs never became entitled to maintain any claim against the defendants under s. 10 of that Act, nor did the defendants ever become liable to the plaintiffs thereunder.

Horridge J. held that the plaintiffs were entitled to recover; inasmuch as a certificate of insurance had in fact been delivered to the insured within the meaning of s. 10 of the Act of 1934, the judgment sued upon had been obtained after the coming into force of the section, and the defendants had not obtained a declaration under sub-s. 3 of the section that they were entitled to avoid the policy; and notwithstanding that the earlier action had been brought and the policy and certificate of insurance cancelled before the coming into force of the section.

The defendants appealed.

Tristram Beresford for the appellants. Horridge J. was wrong in holding that the plaintiffs were entitled to recover against the insurance company under s. 10 of the Road Traffic Act, 1934, notwithstanding that the accident happened, and the policy and certificate of insurance had been cancelled, before the passing of that Act and the coming into operation of s. 10. Sect. 10 did not come into operation until January 1, 1935, under an order made by the Minister of Transport on November 14, 1934. The action brought by the plaintiffs against the insured was commenced on August 3, 1934, it was therefore impossible for the insurance company to avail themselves of the protection given by sub-s. 3 of s. 10, because

C. A.
1936

Croxford v. Universal Insurance Co.
Norman v. Gresham Fire and Accident Insurance Society.

the three months, within which the insurance company must have commenced an action under sub-s. 3 for a declaration that they were entitled to avoid the policy on the ground that it was obtained by the non-disclosure of a material fact or by a false representation, would have expired on November 3, and at that time the section was not in force. The insurance company could not commence an action for a declaration under sub-s. 3 of s. 10 until that section had been brought into operation. Even if the insurance company obtained such a declaration it would not benefit them, because they had not given the plaintiffs notice thereof specifying the non-disclosure or false representation on which they proposed to rely. The Road Traffic Act, 1930, by ss. 35 and 36 required that a policy of insurance against third-party risks should be in force in relation to the user of motor vehicles on the roads. The Third Parties (Rights against Insurers) Act, 1930, provided that in the event of the insured becoming bankrupt, if the insured had incurred liability to a third party, any rights which the insured had against his insurers under the contract of insurance in respect of that liability should be transferred to and vest in the third party. That Act, however, did not give the third party greater rights against the insurers than the insured had. If the insurers were entitled to cancel the contract against the insured for non-disclosure of material facts or for a false representation, the third party would be in no better position than the insured. Sect. 10 of the Act of 1934 was enacted to remedy that position. But until the Minister of Transport had made the order of November 14, 1934, s. 10 had not come into operation and formed no part of the law, and the insurance company could not take advantage of the protection afforded by sub-s. 3 of that section. The rights of the parties must therefore be determined by the 1930 Act, and there is nothing in that Act which interferes with the insurance company's rights at common law. Sect. 38 of the Road Traffic Act, 1930, does not apply to a case where the insurance company could repudiate the policy of insurance altogether for non-disclosure of material facts or misrepresentation. In

Ward v. *British Oak Insurance Co.* (1) Scrutton L.J. said with reference to the Third Parties (Rights against Insurers) Act, 1930: "Without reference to decided cases I should think that those words referred to liabilities incurred to third parties after, but not to liabilities incurred before, the passing of the Act. Prima facie an Act deals with future and not with past events. If this were not so the Act might annul rights already acquired, while the presumption is against that intention." It is stated in Maxwell on Interpretation of Statutes, 7th ed., p. 186, that "it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication": see per Kennedy L.J. in *West* v. *Gwynne* (2); *Moon* v. *Durden*. (3) In the present case there is no such clear implication, and further the insurance company had acquired a vested right before the passing of the Act by cancelling the policy of insurance.

Robert Fortune for the respondents. It is true that prima facie an Act of Parliament deals with the future and is not retrospective, but it was held in *Quilter* v. *Mapleson* (4) that the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 2, was not confined to breaches taking place after the Act came into operation but extended also to breaches committed before the Act. The Road Traffic Act, 1934, s. 10, was passed to remedy a serious defect in the Act of 1930, and it ought to receive a lenient and favourable construction in favour of the injured person. Although s. 10 of the 1934 Act did not have any legal force until the Order of the Minister of Transport was made bringing it into operation on January 1, 1935, yet Parliament intended that as soon as it was brought into operation it should have an immediate effect. The insurance company could at any time between July 31, 1934, when the Act was passed, and January 1, 1935, when s. 10 came into operation, have taken proceedings to obtain a declaration so as to have obtained the protection of that

(1) [1932] 1 K. B. 392, 397.
(2) [1911] 2 Ch. 1, 15.
(3) (1848) 2 Exch. 22.
(4) (1882) 9 Q. B. D. 672.

section. There was jurisdiction in the Court under Order xxv., r. 5, to entertain an application for a declaration.

Tristram Beresford replied.

NORMAN *v.* GRESHAM FIRE AND ACCIDENT INSURANCE SOCIETY, LIMITED.

Appeal by the plaintiff from a decision of Lewis J. in an action tried without a jury.

The plaintiff, Norman, was on September 13, 1934, a passenger in a motor coach which came into collision with a lorry belonging to Tanner's Transport, Ld., and the plaintiff thereby sustained personal injuries. On October 26, 1934, he brought an action against the owners of the motor coach and Tanner's Transport, Ld., which was tried before du Parcq J., who on February 12, 1935, gave judgment for the plaintiff for 2123*l.* against Tanner's Transport, Ld., in respect of the accident, the owners of the motor coach being exonerated from all blame for the accident. The judgment was not satisfied, and on April 1, 1935, Bennett J. ordered that Tanner's Transport, Ld., should be wound up, whereupon the rights of Tanner's Transport, Ld., against their insurers in respect of any contract of insurance under the Road Traffic Act, 1930, became, by virtue of the Third Parties (Rights against Insurers) Act, 1930, vested in the plaintiff.

The plaintiff on May 1, 1935, commenced the present action against the Gresham Fire and Accident Insurance Society, Ld., claiming a declaration that the Society were liable by virtue of a contract of insurance made between them and Tanner's Transport, Ld., a company in liquidation, to pay to the plaintiff 2123*l.*, being the amount of the judgment recovered by the plaintiff against Tanner's Transport, Ld.

The plaintiff alleged by his statement of claim that there was a contract of insurance made in or about January, 1934, under which the defendants agreed to indemnify Tanner's Transport, Ld., against liability at law for compensation and claims, costs and expenses in respect of bodily injury to any person caused by or arising out of the use of a Ford lorry for one year from January 17, 1934. The contract was partly

C. A.
1936

CROXFORD
v.
UNIVERSAL
INSURANCE
CO.
NORMAN
v.
GRESHAM
FIRE AND
ACCIDENT
INSURANCE
SOCIETY.

verbal and partly in writing. In so far as it was verbal it was made by telephone conversations between a man named Tanner acting as agent for Tanner's Transport, Ld., and a man named Williams, who was an agent for the defendants. So far as the contract was in writing it was contained in cover notes issued by the defendants to Tanner's Transport, Ld., on the following dates; January 17, April 6, 27, May 30, August 7 and 22, and September 13, 1934.

The defendants by their defence admitted that the cover notes were issued, but they denied that there was ever made, or that Williams ever had any authority to make, a contract of insurance as between themselves and Tanner's Transport Ld., or that there was any insurance in force at the time of the accident. The cover note dated August 22, 1934, had expired on September 6, and no further cover was granted by the defendants in respect of the vehicle and no premium paid until after the accident had happened on September 13. The defendants also alleged that if they purported to grant cover they were induced to do so by Tanner falsely representing on September 13, 1934, to Williams that the vehicle had not been involved in any accident or mishap between September 6 and 5.30 P.M. on September 13, whereas Tanner knew that the vehicle had been involved in an accident at 2.15 P.M. on September 13. The defendants further said in their defence that Tanner failed to disclose the cancellation of previous policies with other insurance companies, which fact entitled them to cancel this contract of insurance, if there was one.

Lewis J. came to the conclusion on the evidence that there never was a contract entered into by the defendants on January 17, 1934, to insure the vehicle for one year, and that being so it was not necessary for him to decide whether s. 10 of the Road Traffic Act, 1934, had a retrospective effect. If, however, it had been necessary for him to decide the point he should have followed the decision of Horridge J. in *Croxford* v. *Universal Insurance Co.* (1), and held that the Act was retrospective.

The plaintiff appealed.

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(1) [1935] 2 K. B. 409.

Sullivan K.C. and *W. B. Franklin* for the appellant. The insurance company issued cover notes for a fortnight to Tanner which enabled him to obtain a licence for the motor lorry to be on the road. These cover notes had endorsed on their back certificates of insurance. The insurance company say that there was no contract of insurance, or that if there was a contract it was voidable on account of suppression of facts and misstatements. The insurance company are liable to the plaintiff by reason of s. 10, sub-s. 1, of the Road Traffic Act, 1934, inasmuch as the plaintiff obtained a judgment against a person insured by the defendant insurance company, notwithstanding that the insurance company may be entitled to avoid or cancel the policy. That section is an expansion of the Third Parties (Rights against Insurers) Act, 1930. The injured person was thereby given higher rights than the insured person had against the insurers. The question whether s. 1 of that Act has a retrospective effect has been discussed, and it was held in *In re Nautilus Steam Shipping Co.* (1) that in the case of a liquidation begun after the Act of 1930 came into force, it related to liabilities of the company insured incurred before the Act came into force. The Act of 1930 did not do more than operate as an assignment to third parties of the rights of the assured against their insurers. If the contract between the assured and the insurers was liable to be voided by reason of non-disclosure the third party to whom the rights of the assured had been assigned was in no better position than the assured. But that position was altered by s. 10 of the Road Traffic Act, 1934, and now by sub-s. 1 insurers are bound to satisfy judgments obtained against persons insured in respect of third-party risks, notwithstanding that the insurers may be entitled to avoid or cancel the policy, provided (sub-s. 2) that the insurers have been given notice of the proceedings in which judgment was given within seven days of the commencement of those proceedings. There is no ambiguity in s. 10, sub-s. 1. It depends upon the happening of an event—namely, that a judgment has been recovered, and if that event has

(1) [1936] 1 Ch. 17.

C. A.
1936

Croxford
v.
Universal
Insurance
Co.

Norman
v.
Gresham
Fire and
Accident
Insurance
Society.

happened then the injured person is entitled to be paid by the insurance company notwithstanding that the policy is voidable or has been voided. If an insurance company has delivered a certificate of insurance to the insured person thereby allowing a licence to be obtained and so enabling a motor to be used on the roads, and an injury is afterwards occasioned to a third person who obtains a judgment against the insured, the insurance company must satisfy the judgment notwithstanding that it might avoid the policy. Insurers are given an independent defence by sub-s. 3 of s. 10, but if there is any ambiguity with reference to that sub-section it does not nullify the rights given by sub-s. 1 to third parties. The Act received the Royal assent on July 31. If insurers do not serve the injured person with the notice referred to in sub-s. 3 of s. 10 specifying the non-disclosure or false representation upon which they propose to rely in proceedings to avoid the policy, then the event which could protect them against a subsequent judgment in favour of the injured person has not taken place. If the insurers cannot fulfil the conditions upon which they are excused from liability in an action under sub-s. 1 of s. 10 they have no defence to an action under that sub-section. The insurance company knew in October that an action would probably be brought by the injured person, and therefore there was nothing to prevent them giving the necessary notice to Norman, and commencing an action for a declaration that the policy was void. No Court would have failed to entertain such an action having regard to the fact that there was every probability that s. 10, which was then on the statute book, although not yet in force, would be brought into operation at an early date. In that case the insurers would not be taking proceedings under any section, but would be merely bringing an action for a declaration, which under s. 10 of the Act has the effect of a defence to the claim of the third person against the insurers. Sub-s. 3 of s. 10 contains no reference to sub-s. 1, it deals exclusively with the defence given to insurers, but there is a reference to sub-s. 1 in sub-s. 2 which is a limitation on the rights given to third persons by sub-s. 1. The event

C. A.
1936

CROXFORD
v.
UNIVERSAL
INSURANCE
CO.
NORMAN
v.
GRESHAM
FIRE AND
ACCIDENT
INSURANCE
SOCIETY.

upon which the coming into operation of the rights given by sub-s. 1 of s 10 to third persons depends is not the commencement of an action after s. 10 is brought into operation, but the recovery of a judgment in respect of a liability covered by a policy of insurance, obtained against a person insured by the policy after Part II. of the Act has been brought into operation. An Act does not become ambiguous because it brings about a result which the Court thinks unjust. Sub-s. 3 of s. 10 cannot be used to create an ambiguity in sub-s. 1 which does not exist. The insurance company could have obtained a declaration under Order xxv., r. 5, that they were entitled to avoid the policy by reason of the misstatements of fact and non-disclosure of material facts. They had no need of sub-s. 3 of s. 10 for that purpose. The plaintiff is unable to challenge the finding of the judge upon the question of non-disclosure of material facts, but the insurance company's documents strongly support the plaintiff's contention that a policy of insurance was in existence at the time of the accident. In *Rorke* v. *Errington* (1) Lord Campbell L.C. said: " it is a case of great hardship on the part of the plaintiff in error, but the High Court and all other Courts must take care that hardship does not produce bad law." That dictum directly applies in the present case. [*In re Tottenham's Estate* (2) was also cited.]

Croom-Johnson K.C. and *M. Berryman* for the respondents. The insurance company not only say that there was non-disclosure of material facts, but also allege fraud on the part of Tanner. Sect. 10 of the Act of 1934 does not apply to the present case because there was no insurance in force at the time of the accident, and further that section was not brought into operation by the Minister of Transport, under the power conferred upon him by s. 42 of the Act, until January 1, 1935. Sect. 10 does not have a retrospective effect. The principle is stated in Maxwell on the Interpretation of Statutes, 7th ed., p. 186, thus: " Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. Nova constitutio futuris formam imponere debet, non præteritis. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

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(1) (1859) 7 H. L. C. 617, 628. (2) (1869) 3 Ir. R. Eq. 528, 541.

[They were stopped.]

SLESSER L.J. These two cases, *Croxford* v. *The Universal Insurance Company Ld.*, and *Norman* v. *The Gresham Fire and Accident Insurance Society, Ld.*, have one feature in common: they both depend, to a considerable extent, on the interpretation of a section of the Road Traffic Act of 1934, and although some of the facts in the two cases are different yet having regard to matters which I will later mention, the Court has thought it convenient to hear one case immediately after the other. I propose, therefore, at the outset to state so much of the facts of the two cases as I think are material to this matter which applies to both of them in common and then to distinguish, in so far as it is necessary to distinguish, the facts of one case from the other.

Now both of these actions are actions brought against insurance companies; in the one case by the widow and dependants of a person who had been killed in a motor accident, the widow, Lilian Croxford, and a number of dependants whose Christian names I need not mention, suing under Lord Campbell's Act; in the other case by a Mr. Norman, who was injured in a motor accident, and the liabilities of the respective insurance companies, the Universal Insurance Company, Ld., in the *Croxford* case, the Gresham Fire and Accident Insurance Society, Ld., in the other case, are liabilities which arise by the operation of certain statutes which I shall have to consider, and arise, if I may use the phrase, at second hand; that is to say, the original rights of action of the plaintiffs in both cases were against persons who had done them injury, but by the operation of law beginning with the two Acts of 1930 and the Road Traffic Act, 1934, those liabilities are in certain circumstances transferred to the insurance companies, who thereby become defendants in the present actions.

It may be convenient at this point to mention the material dates which give rise to the present causes of action. In the case of *Croxford*, the accident occurred on June 9, 1934. The action was brought by the dependants against the persons responsible for the accident, the persons who were insured, on August 3, 1934, and judgment in that action, in what is conveniently called the running-down action, was given on February 6, 1935, for 3000*l.* and costs. The present action against the Universal Insurance Company was brought upon April 2, 1935. Those are the material dates so far as regards the *Croxford* action. With regard to the *Norman* action, the accident occurred on September 13, 1934. The running-down action against the assured was brought on October 26, 1934. On February 12, 1935, judgment was given in that action. Subsequently there was a winding-up on April 1, 1935, of the firm called Tanner's Transport Company, Ld., who were the defendants in that running-down action, and the present action against the insurance company was instituted on May 1, 1935. Those seem to me all the material dates which I have to consider so far as the actual acts done by the parties in litigation are concerned.

So far as the law is concerned, the matter stands thus. Before 1930 there was no nexus in law between the insurance company and a plaintiff who was suing the assured of that insurance company for damages when that assured had been insured against the events which caused the action to be brought. The sole remedy at common law of the plaintiff was against the person who had injured him, and whatever relations there might have been between that person and the insurance company did not affect the plaintiff, except to this extent, that, of course, normally one would find provisions for subrogation in the conditions of the insurance company, and the insurance company no doubt under their contract of insurance with the assured would have the right to conduct the proceedings in certain circumstances in the place of the assured.

By the Third Parties (Rights against Insurers) Act, 1930 (20 & 21 Geo. 5, c. 25), third parties injured, that is the plaintiff in the running-down action, were given certain rights in the event of the insured becoming insolvent and in certain other events, and by s. 1, sub-s. 1, of that Act, it was for the first time provided, producing a novel situation in the law: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then in the event of the insured becoming bankrupt," and in certain other cases, in the case of companies being wound up and the like, "if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act . . . . be transferred to and vest in the third party to whom the liability was so incurred." At that time there was no obligation upon persons driving motor-cars to insure themselves. This short Act which I have mentioned is general in its terms and is not limited as such to any particular class of insured person. It applies to any contract of insurance where a person is insured against liability to third parties. But by the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), a special provision against third-party risks was made over and beyond what had been dealt with in the Third Parties (Rights against Insurers) Act, 1930, to which I have already referred, in the case of persons using motor vehicles. It is Part II. of the Road Traffic Act, 1930, and s. 35, generally speaking, provides that "it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance . . . . in respect of third-party risks as complies with the requirements of this Part of this Act." Then in s. 36 the requirements of such a policy are prescribed and it is not necessary, I think, to deal with the particular machinery required with regard to deposits and the like; but s. 38 is very important, in my opinion, for the present case. Sect. 38 provides this: "Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (*b*) of sub-section 1 of section 36." Now para. (*b*) of sub-s. 1 of s. 36 is dealing with a policy of insurance which "insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road." It will be noticed that the conditions which are not to exempt the insurance company from liability to a third party, even if they be broken by the assured, in s. 38 are limited to cases of "some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy"; in other words, the fact that an assured fails, for example, under the conditions of a policy to give notice of the accident, which might otherwise, as between the assured and the insurance company be a sufficient answer for the insurance company not to pay, shall not avail as against the third party; but it will be noticed that the protection of the third party notwithstanding the fact that the assured has not complied with all the conditions, which is given by s. 38, is limited to things done or omitted to be done after the happening of an event giving rise to a claim; in other words, if the contract were, to take the case which it is said has arisen here, voidable by the insurance company ab initio for non-disclosure of a material fact, that circumstance would not in itself bring the case within s. 38 of the Act of 1930, and the insurance company could still be heard to say, as against the third party: "This policy of the assured on which it is sought now to make me liable does not apply because there has been a non-disclosure of a material fact."

In both the present cases the two learned judges who tried the cases have found that with regard to the insurances there was non-disclosure of material facts. In the case of *Croxford*, where this point had been raised by the insurance company, Horridge J. finds that as a fact. I shall have to refer further to Horridge J.'s judgment, but in reality in that case there was no question, because not only was it said by the insurance company that there had been such a material non-disclosure, but the certificate of insurance which had been granted in that case was cancelled on July 12, 1934, for that reason. In the case of *Norman*, the circumstances of which again I shall have to examine in some further detail later, Lewis J. says this (1): "I hold that the fact that the policies had been cancelled is a material fact which was concealed"—that is that previous policies had been cancelled—"and wilfully concealed, from the defendants, if it is ever necessary to decide that point for the purposes of this case." So here we have two cases which, in my opinion, before the Act of 1934, in their circumstances would have justified the insurance companies, notwithstanding s. 38, or any other provision of the Act of 1930, in saying that they were immune from any liability to the third party. In those circumstances it is sought to make the insurance companies liable by reason of new legislation in the Road Traffic Act, 1934, to which I must now refer.

As regards the Act of 1934, that Act is one which, although it received the Royal Assent on July 31, 1934, contained, as many modern Acts do contain, a provision in s. 42, sub-s. 3, that: "This Act shall come into operation on such day or days as the Minister may appoint, and the Minister may fix different days for different purposes and different provisions of this Act." Acting under that sub-section of s. 42, the Minister on November 14, 1934, ordered that s. 10, which is the only material section here as altering the law as regards third-party risks should come into operation on January 1, 1935.

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(1) (1935) 52 Ll. L. Rep. 292, 301.

I must now refer to an observation made by Horridge J. in the case of *Croxford* (1) on this point. Horridge J. says this: "In this case, however, the Act of Parliament was known, as it received the Royal Assent on July 31, 1934, and I cannot see why the defendants could not have taken proceedings under sub-s. 3 to obtain protection under that section." With every respect to the learned judge, I cannot understand quite what the learned judge means by that sentence or what conclusion he intends to draw from it; but, in my opinion, it is impossible to say that for any purpose at all affecting the legal position between the parties s. 10 can be regarded as having any legal existence before the time that it is put into operation by the Minister under s. 42, sub-s. 3, of the Act. Either s. 10 of this Act is part of the law or it is not, and it is clear to my mind that before January 1, 1935, the Road Traffic Act, 1934, or at any rate such parts of it as the Minister had already brought into force by earlier Orders under s. 42, must be read as if s. 10 did not exist and, reading s. 10 as having no existence before January 1, 1935, important consequences arise in the present case. Sect. 10 of the Road Traffic Act, 1934, deals with that very matter which was left out of s. 38 of the Act of 1930—namely, the case where the insurance company were entitled to avoid or cancel the policy. The language of s. 10, sub-s. 1, is as follows: "If, after a certificate of insurance has been delivered under sub-section 5 of section 36 of the principal Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (*b*) of sub-section 1 of section 36 of the principal Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments." Now the effect of the sub-section standing alone is this, that after the passing of that section a further possible defence of insurance companies is taken away. They are no longer, if the policy be one covering the liability to a third party, able to take the point as against that third party that the insurer might be entitled to avoid or cancel the policy; they had already, as I have said, been prevented from taking that position in regard to matters which had been done or omitted to be done after the happening of the event giving rise to a claim by s. 38 of the Road Traffic Act, 1930, but now they are prevented from taking the point that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

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(1) [1935] 2 K. B. 409, 416.

Now it is said in this case on behalf of the two respective claimants that, in both these cases, judgment was given after the coming into force of s. 10, being judgment for 3000*l.* in the case of *Croxford* on February 6, 1935, and being judgment in *Norman's* case for 2123*l.* on February 12, 1935, and it is said that although there is a finding in both cases of non-disclosure of a material fact, such as might justify the insurance company in avoiding or cancelling the policy, and such as did in fact enable the insurance company, in the case of *Croxford*, to cancel the policy, nevertheless s. 10, sub-s. 1, operates now that a judgment has been obtained after s. 10 has come into operation, that being, to use the language of s. 10, a judgment in respect of any such liability as is required to be covered by a policy under para. (*b*) of sub-s. 1 of s. 36 of the Act of 1930; therefore, the insurance company cannot be heard to say that they had a right to avoid or cancel, or did avoid or cancel these policies, and were under no liability. Such a view is only possible if sub-s. 1 is to be read by itself, without any regard to the remainder of the sub-section. We have been favoured by Serjeant Sullivan with an interesting analysis of the law, as to how far one is permitted, as a matter of general principle, to read one section or sub-section of an Act in the interpretation of another section or sub-section. For that purpose

C. A.
1936

CROXFORD v. UNIVERSAL INSURANCE CO.
NORMAN v. GRESHAM FIRE AND ACCIDENT INSURANCE SOCIETY.

Slesser L.J.

we have been referred to certain cases of weight in Ireland, and Mr. Croom-Johnson has also favoured us with extracts from the well-known work of Maxwell on the Interpretation of Statutes. But, in my view, it is not necessary in the present case to consider questions of general interpretation. In my view, when the present section is considered, its own terms and its own conditions make it quite clear that s. 10 is one which makes the insurance company liable in conditions and under circumstances which are clearly specified in the whole of that section, and not merely in sub-s. 1; that is to say, for the purpose of estimating the liability of the insurance company the section must be read as a whole.

There is this great distinction to be drawn between s. 38 of the Act of 1930 and s. 10 of the Act of 1934, that s. 38 of the Act of 1930, apart from one special proviso, does not qualify the liability of the insurance company. The language is express with regard to the liability not ceasing in the event of some specified thing being done, or omitted to be done, after the happening of an event. But in the case of s. 10, which is a very serious extension of the liability of the insurance company—indeed, one might almost say, a remarkable extension—making them liable to a third party on a policy which ex hypothesi either does not exist or which they have a right to avoid, it is carefully qualified to give them protection. It is not every judgment which comes under s. 10, sub-s. 1, which makes the insurance company liable to a third party. To begin with, when we read s. 10, sub-s. 1, we find this language: "The insurer shall, subject to the provisions of this section, pay," and that in itself, apart from any question of general principle, is a direct limitation of a liability to pay, a liability which, as Mr. Croom-Johnson quite rightly observed, would be an invasion of their common law rights, putting upon them an obligation which did not exist under the contract between them and the assured. In terms, this section says: "The insurer shall, subject to the provisions of this section, pay." Now, what are the provisions of this section? Serjeant Sullivan has said that, at the highest, they only apply to the provisions of sub-s. 2, which

Slesser L.J.

says that " no sum shall be payable by an insurer . . . . in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings." That is referring, of course, to the judgment in the running-down action. That sub-section, we are told, does not apply here, as both in *Norman's* case and in *Croxford's* case notice was given or, at any rate, if notice was not given, no point was made about the absence of notice in the Court below. I express no opinion about it, because I have arrived at a conclusion favourable to the insurance company for other reasons. But it is useful for the purpose of construction to look at it. A consideration of the sub-section indicates that the obligation to pay is not absolute ; it only arises where the subject matter of sub-s. 1 might otherwise make the insurance company liable, where before or within seven days the insurer had notice of the bringing of proceedings. Then there follow a number of other provisions to the like effect. But the sub-section here with which we are primarily concerned is sub-s. 3, and for myself I can see no reason why sub-s. 3 is not as much to be read into sub-s. 1 as sub-s. 2. I will again repeat that sub-s. 1 says : " The insurer shall, subject to the provisions of this section, pay," and the opening words of sub-s. 3 are : " No sum shall be payable by the insurer under the foregoing provisions of this section." Those conditions are the conditions under which the insurance companies respectively argue here that they are not liable in the present case. It is therefore necessary to consider them very critically Sub-s. 3 provides as follows : " No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given "—that is the judgment in the running-down case— " he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this sub-section as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto." In other words, notwithstanding the wide language of sub-s. 1, making the insurance company liable even where he might have avoided or cancelled the policy, the insurance company may protect themselves, and can take steps that s. 10 shall not apply to them, if they comply with the conditions set out in sub-s. 3 and, as the result of taking proceedings under sub-s. 3, obtain the necessary declaration that the judgment was obtained by non-disclosure of a material fact, or representation of fact false in some material particular; that is to say, they themselves bring an action for a declaration for that purpose, and under sub-s. 3, they must bring such action either before or within three months after the commencement of the proceedings in which the judgment was given.

Now applying that protection to the present case, I arrive at this result. The action which we have to consider, from which the three months should be dated, is, of course, the action in the running-down case. In *Croxford's* case, the action was brought on August 3, and therefore, up to November 3, 1934, the insurance company would have had a right to start their action for a declaration exempting them from the provisions of s. 10. It immediately appears obvious that, in this present case, no such right could possibly inure to their benefit, because in so far as s. 10 did not come into operation until January 1, 1935, there were, in my opinion, on November 3, the last day of their election to get a declaration, no statutory means for them to obtain such a declaration as is provided in sub-s. 3. Serjeant Sullivan being faced with this fact, although the point did not so much arise in his case as in the earlier case, but speaking generally of these cases, says: "A declaration might be obtained in some proceedings for the rescission of the contract of insurance under the ordinary practice familiar in the Chancery Division for the rescission of a contract and consequent declaration." In my opinion that is entirely wrong. If there were any doubt at all that the declaration here contemplated was to be obtained by statutory machinery provided by sub-s. 3, and in no other way, it is made quite clear by the proviso which I have already read, and which says the insurer who has obtained such a declaration shall not be entitled to the benefit of the sub-section unless within seven days after the commencement of that action—that is his action for a declaration—he has given notice thereof to the person who is the plaintiff, specifying the non-disclosure or false representation. It is clear to my mind, therefore, that, given three months for his action and seven days more for his particularization, those particulars have to be given in accordance with the provisions of sub-s. 3; particulars given in an ordinary action for rescission of the contract and declaration would not specify the specific matters required in the proviso. It might well be, for example, that if the other side did not apply for particulars, in an ordinary action for rescission there would be no need for the plaintiff to specify the non-disclosure or false representation. It might well go to trial without such particularization as is here mentioned. Here the Statute in terms says that he must specify the non-disclosure or false representation on which he proposes to rely, "and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto." It is clear that on November 3, which would have been the last day on which the declaration could have been made, and for seven days thereafter within which the particularization could be made, it would have been of no avail for this insurance company to say: "It is true that sub-s. 3 of s. 10 is not in force, but I know this Act is passed; I anticipate that some day a Minister may appoint a day for

s. 10 to come into operation and therefore in order to be quite safe I will get rescission of this contract in a court of law." Such a proposition, with every respect to the learned Serjeant, seems to me only to have to be stated to bear its own refutation. It is perfectly obvious that such a hypothetical case dealing with an imaginary danger, even though such an action could be entertained at all, would certainly not avail the insurance company here, and that if they wished to be exempted from s. 10, they must comply with the specific provisions of that section. It therefore follows that in *Croxford's* case it was impossible at any time for this insurance company to avail themselves of the machinery for exempting themselves from liability under s. 10, and if the plaintiffs here are right, it follows that the effect of this Act, in cases of judgments obtained after s. 10 came into operation, but of actions brought before, is that insurance companies are in this invidious position, that they are liable to all the burdens of s. 10 and have no right to take advantage of any of the exceptions or protections; in other words, that the position of an insurance company is worse before January 1, 1935, than it would have been afterwards, a most ridiculous situation, which really, as I say, with every respect to those who have argued it, merely has to be stated to be shown not only wrong, but lucidly wrong.

The only difference in *Norman's* case is this. In *Norman's* case the running-down action was not commenced until October 26, and the result of that would be that, in that case, the three months within which the insurance company had to start their action for a declaration would not have expired till January 26, 1935, and they would have had twenty-five days in which to make up their mind whether they would start an action for a declaration or not. But in my opinion, when the section is properly considered, that makes no difference. I think that the statute contemplates that the insurance company shall have three months in which to make up their minds, whether they will sue for a declaration or not. In *Norman's* case they have twenty-six days. I see no reason for cutting down the ambit of their protection in that case.

The case, on the face of it, is not so obviously unjust as that of *Croxford*, but I think the same principle applies—namely, that all the obligations of an insurance company under s. 10 are subject to all the privileges and exceptions and exemptions given them, and one of the exemptions given them is that they may get this declaration that the policy has been obtained by non-disclosure of a material fact, and that they may have three months in order to get their declaration, and as they are here given only twenty-six days, it follows also that in their case they have not the full benefit of the section; in other words, you cannot apply s. 10 as to its burdens without equally giving to the person to be adversely affected the benefits of the section. That really concludes these cases, because in neither of these cases can it be said that three months were given to either insurance company to make up their minds whether they would or would not get a declaration, and that concludes both cases against the plaintiffs, because the result is that s. 10 cannot be applied to either of these insurance companies, and both these cases being cases of non-disclosure of material facts, they cannot be brought within s. 38 of the earlier Act, nor, of course, was there any liability on the insurance companies at common law, or by any other statute. But I must just add one or two matters which affect, more particularly, the case of *Norman*. In the case of *Croxford*, the matters which I have here discussed seem to have been directly in issue, and no other matters strictly were raised. As I have said, I do not follow the reasoning of Horridge J., and I do not agree with him when he says: "I cannot see why the defendants could not have taken proceedings under sub-s. 3 to obtain protection under that section." It is a sufficient answer that they could not have done it, because the section at that time was not effectually in existence; but with regard to *Norman*, I should mention this, that the case took a rather different course. In *Norman's* case, the primary defence of the insurance company was that there never was, in the circumstances of the case, any contract between them and the assured at all covering the accident which was the subject-matter of the

C. A.
1936

CROXFORD
v.
UNIVERSAL
INSURANCE
CO.
NORMAN
v.
GRESHAM
FIRE AND
ACCIDENT
INSURANCE
SOCIETY.

Slesser L.J.

litigation. On that point Lewis J. has found, without any doubt at all, that that contention was right—I read from the head-note (1) and it substantially states what Lewis J. had considered in great detail and at great length—" *Held*, that the evidence showed that there was no contract agreed upon between the parties to cover the lorry for any period including the time of the accident." Of course, on that finding, the plaintiffs there would fail, because if there was no contract between the assured and the insurance company, a fortiori there was no liability between the insurance company and the third party. But it was alternatively said in *Norman's* case that there was non-disclosure of a material fact and, as I have said, Lewis J. has found alternatively that that fact was well maintained; but he gave judgment solely on the ground, as I understand it, that there was no contract in existence at all, and that was sufficient for his purpose. But he does intimate that had that not been his conclusion, he would, notwithstanding his finding that a material fact had been concealed, have felt himself constrained to follow the decision of Horridge J. and hold that the insurance company would have been liable under s. 10 of the 1934 Act. We have not thought it necessary here to bother Serjeant Sullivan to argue the question whether or not Lewis J. had evidence on which he could come to the conclusion that there was no contract between the parties, because in our view, having regard to the fact that we disagree with Horridge J., it is enough that Lewis J. has found alternatively that the fact that the earlier policies had been cancelled, is a material fact which was concealed, and that decides the case of *Norman* equally with the case of *Croxford* against the plaintiff. But it by no means follows that had we taken, in *Norman's* case, a different view and agreed with Horridge J., that none the less, Mr. Croom-Johnson would not have been able to succeed in saying that Lewis J. was right in holding that there was no contract between the parties, and that in any case he would have had other material on which to support the judgment. We allow the appeal in *Croxford's* case, directly reversing the decision of Horridge J., and in the case of *Norman* we dismiss the appeal. But while we apply that principle to *Norman's* case too, I by no means say that the reasons Lewis J. gave in holding that there was no contract were not correct, and that even had Serjeant Sullivan succeeded in persuading us that the principle which Horridge J. lays down was right, he might yet equally have failed to satisfy us that he was entitled to judgment.

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(1) 52 Ll. L. Rep. 292.

SCOTT L.J. I agree with the judgment that has just been delivered by Slesser L.J., and it is not necessary for me to refer to the facts in detail or to cover so much ground as has been so carefully covered by my Lord, but I want to draw attention to certain differences between the two cases on their facts. A most important difference is that, in *Croxford's* case, on June 29, 1934, three weeks after the date of the accident, the insurance company repudiated liability on the ground that there had been material non-disclosure, and demanded back the certificate of insurance. The assured assented to the view that they were entitled to avoid the insurance contract, and returned the certificate on July 12. The Royal Assent was not given to the Act of 1934 until July 31. Therefore, from July 12 to 31, the defendant, in the subsequent proceedings in the negligence action, was uninsured, and that aspect of the matter was not, in my view, considered by Horridge J. in the Court below. I cannot see how, if the person who had been insured ceased to be insured because the contract of insurance was actually rescinded, by reason of non-disclosure, before the Royal Assent was given to the Act on July 31, it could possibly be said that the Act when passed had anything to do with the case. Therefore, on that ground alone, I think the appeal in *Croxford's* case ought to be allowed. But assuming that the question could arise in that case, which I do not think it can, it is the same question as arises in *Norman's* case.

The only other difference of importance between the two cases is that in *Croxford's* case, the writ in the negligence action was issued on August 3, 1934, and the three months period referred to in sub-s. 3 of s. 10 of the Act of 1934 would therefore have expired on November 3, whereas, in *Norman's* case, the writ was not issued until October 26, and that period would not have expired therefore until January 26. We have had a good deal of discussion in the case about the principles of statute interpretation, and I cannot help feeling, and feeling strongly, that the temptation to call in aid principles of interpretation is too great for many people and often defeats its own purpose; at least, makes the principle defeat its own purpose. Where the words of an Act of Parliament are clear, there is no room for applying any of those principles of interpretation, which are merely presumptions in cases of ambiguity. Serjeant Sullivan said that s. 10, sub-s. 1, is free from ambiguity, and he called in aid the principle that where the words of an Act of Parliament are quite clear, you must give them their natural meaning. Then he cited two cases of practical injustice done by an Act of Parliament where the words of the Act were too clear to enable the Court to avoid the injustice; but to cite cases of that kind does not take one anywhere. The whole question is whether the assumption made by Serjeant Sullivan that sub-s. 1 of s. 10 is clear was a justifiable assumption. According to him the sub-section indicates by its tenor that it is to be read by itself as if sub-s. 2 and sub-s. 3 of s. 10 were not in the section at all. But the learned Serjeant is hoist by his own petard, because sub-s. 1 says in terms that the right to recover from the insurer is "subject to the provisions of this section." I really do not understand the relevance of the learned Serjeant's citation of cases where the language of the statute was completely self-contained, and it was not possible to introduce any controlling provisions of the statute in question to avoid what seemed to be an injustice in those cases. Here the sub-section upon which he has to rely itself says: This sub-section is subject to sub-s. 2, sub-s. 3, and, it may be, sub-ss. 4, 5, and 6, if we had to consider them. That being so, the rights conferred by sub-s. 1 are only those rights which are consistent with the provisions of sub-s. 2 and sub-s. 3. I entirely agree with Slesser L.J. that the provisions of sub-s. 3

are intended to protect the insurer from the liability of sub-s. 1, if he carried out the conditions of sub-s. 3, which entitle him to immunity. If that is the true interpretation of the whole section, then the principle prayed in aid by Serjeant Sullivan falls to the ground.

I should like to make this observation about the principle called in aid by the respondent's counsel in *Norman's* case—namely, that which is stated and explained on p. 186 of the 7th ed. of Maxwell on the Interpretation of Statutes. That page seems to me to contain an almost perfect statement of the principle that you do not give a statute retrospective operation unless there is perfectly clear language showing the intention of Parliament that it shall have a retrospective application. In s. 10 I can see no justification whatever for the contention that any provision of sub-ss. 1, 2 and 3 is intended to have any operative effect at all on any date before the Order of the Minister of Transport under s. 42 of the Act has brought the section into operation. Therefore, I am satisfied to base my judgment upon the view that the provisions of sub-s. 1 of s. 10 have no operation in regard to any case until such a date after January 1, 1935 (when the section was brought into operation), as shall leave time subsequent to that date for all the conditions contained in sub-ss. 2 and 3 to be made effective in accordance with the detailed provisions as to time contained therein.

That decision is enough to dispose of both cases; but in regard to *Croxford's* case there is the further point that there was a period of time between the cancellation of the insurance on July 12 and the coming into force of the Act on July 31. The respondent in this Court had really no argument upon which to base a contention that the Act could be treated as retrospective in regard to that period. But I can see no difference in principle between that period and the period of the next six months down to January 1, 1935, except the principle, if it be a principle, which Horridge J. prayed in aid in *Croxford's* case. He said (1), and it is important to quote the words of his judgment: "It was

(1) [1935] 2 K. B. 416.

C. A.
1936

CROXFORD
v.
UNIVERSAL
INSURANCE
CO.
NORMAN
v.
GRESHAM
FIRE AND
ACCIDENT
INSURANCE
SOCIETY.

Scott L.J.

further pressed upon me that sub-s. 3 of s. 10 shows that section could not be intended to apply to a cancellation of an insurance certificate before the Act came into operation, as it was suggested that proceedings could not be taken for the declaration mentioned in that Act before the Act came into operation. In this case, however, the Act of Parliament was known, as it had received the Royal Assent on July 31, 1934, and I cannot see why the defendants could not have taken proceedings under sub-s. 3 to obtain protection under that section." I do not think he could have invoked that consideration in regard to the period between the cancellation of the insurance contract on July 12 and July 31, during which time the Act was only a Bill before Parliament and might have been sent back and amended in Parliament, or might have been re-committed. Anyhow, I do not recognize any legal principle upon which that observation can be based.

I only want to add one further observation, and that is this: Under sub-s. 3 of s. 10, the declaratory judgment has to be obtained in an action brought by the insurer, presumably against the assured. If the policy is still in force but voidable, he has to ask for a declaration that he is entitled to avoid it. If it has already been avoided on the ground of misrepresentation or non-disclosure of a material fact he is told to bring an action also apparently against his assured recording past history and saying that the policy has been avoided. The statute says so, but I fail to see quite how that can really have been intended. If the two parties are in agreement that the contract was obtained by misrepresentation or non-disclosure, and have actually rescinded it, it seems difficult to understand why the insurer should have to go to the expense of bringing an action against the assured in order to get a judgment to that effect.

With those observations, I merely express my agreement with the judgment of Slesser L.J.

EVE J. I agree entirely with the conclusion at which my Lords have arrived in each of these cases, and I do not think there is anything which I can usefully add to what they have already said.

C. A.
1936

CROXFORD
v.
UNIVERSAL
INSURANCE
CO.
NORMAN
v.
GRESHAM
FIRE AND
ACCIDENT
INSURANCE
SOCIETY.

In the Croxford case appeal allowed.
In the Norman case appeal dismissed.

Solicitors for appellants (Insurance Company) in *Croxford's* case: *A. D. Vandamm & Co.*

Solicitors for respondents: *E. C. Kilsby & Son*, for *E. Edwards & Son, East Ham.*

Solicitor for appellant (plaintiff) in *Norman's* case: *C. S. Tomlinson.*

Solicitor for respondents: *Devonshire & Co.*

R. F. S.

ROBINSON BROTHERS (BREWERS), LIMITED *v.* ASSESSMENT COMMITTEE FOR THE No. 7 OR HOUGHTON AND CHESTER-LE-STREET AREA OF THE COUNTY OF DURHAM.

1936
April 1.

Rates—Assessment—Rateable value—Licensed premises—Tied house—Competition of brewers occupying by manager—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22, *sub-s.* 1.

In assessing a licensed public-house to rates, the fact that there is a great competition among brewers in the district to obtain the tenancy of such houses in order to carry on the business by managers in their own employment ought not to be excluded from consideration in so far as it shows the existence of such a demand as would raise the market value and thus increase the rent at which the house might reasonably be expected to let from year to year; but the gross estimated rental ought not to be fixed at the special sum above the market value which a brewer might be willing to give on the consideration personal to himself that he might make large profits by carrying on the business of the house by means of a manager in his own employment.

Bradford-on-Avon Union v. *White* [1898] 2 Q. B. 630, discussed and followed.

CASE stated by quarter sessions for the county of Durham pursuant to the Rating and Valuation Act, 1925, ss. 31 and 32.

Robinson Brothers (Brewers), Ld. (hereinafter called "the company"), were the occupiers of a hereditament named the "White Lion Hotel," Houghton-le-Spring, in the Houghton-le-Spring urban rating area, in the county of Durham.

At and before the date next mentioned the company was assessed in the valuation list then in force under the Rating and Valuation Acts for that rating area as the occupier of the said hereditament at 112*l.* gross value and 90*l.* rateable value.

On December 7, 1934, the company made a proposal to the assessment committee for the No. 7 or Houghton and Chester-le-Street assessment area (hereinafter called "the committee"), pursuant to s. 37 of the Rating and Valuation Act, 1925, for the amendment of the valuation list in respect of that hereditament by reducing the assessment.

On February 4, 1935, the committee, having considered that proposal, decided to make no alteration in the valuation list.

On February 15, 1935, the company gave notice of appeal to quarter sessions against the decision of the committee on the ground that the assessment was excessive in view of the volume of trade.

On April 4, 1935, the appeal was heard by the court of quarter sessions.

In para. 2 of the case it was stated that at the hearing of the appeal the following facts were admitted or proved:—

(*a*) The said hereditament is a fully licensed public-house and has been at all material times occupied by the company and managed by a manager in the employment of the company. All the draught beer sold and some of the bottled beer sold in the said hereditament has at all material times been beer brewed by the company or by its associated company, but considerable quantities of bottled beer brewed by Messrs. Bass and Messrs. Worthington were also sold.

(*b*) A large number of licensed public-houses in the committee's assessment area and elsewhere are occupied by brewers and managed by managers in the employment of such brewers. This practice was uncommon in the case of ordinary public-houses down to the time when the case of

Bradford-on-Avon Union v. *White* (1) was decided and for some years thereafter. Practically all the public-houses in the said assessment area are owned by brewers and either managed, as in the case of the said hereditament, or sublet to tied tenants.

(*c*) A brewer taking a tenancy of the said hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery and thus to secure a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make.

(*d*) There were several brewers who, if the said hereditament had been vacant and to let, might reasonably have been expected to compete with each other for a tenancy of the said hereditament.

(*e*) If regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-para. (*c*) hereof might be willing to give, the rent at which the said hereditament might reasonably have been expected to let from year to year would be sufficiently high to support a gross value of 112*l.* Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure.

(*f*) If the competition of the brewers is taken into consideration but the rents which they might reasonably be expected to give for the reasons mentioned in sub-para. (*c*) hereof are excluded from consideration except so far as the possibility of such rents being given raises the rent which might reasonably be expected to be given by a tenant not influenced by these reasons, the rent at which the said hereditament might reasonably have been expected to let from year to year would only be sufficiently high to support a gross value of 95*l*.

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(1) [1898] 2 Q. B. 630.

The court of quarter sessions gave their decision in these terms: "We were of opinion that we were bound to follow the decision of the Divisional Court in *Bradford-on-Avon Union* v. *White* (1) and accordingly we allowed the appeal and fixed the gross value of the said hereditament at 95*l.* If we had considered that we were not bound by the decision of the Divisional Court in *Bradford-on-Avon Union* v. *White* (1) we should have fixed the gross value of the said hereditament at 112*l.*"

The question of law for the High Court was whether the decision of quarter sessions fixing the value of the hereditament at 95*l.* was correct in law, and if not what ought to be done in the premises.

Comyns Carr K.C. and *F. Grant* for the assessment committee, appellants. The court of quarter sessions ought to have fixed the gross value of the public-house not at 95*l.*, but at 112*l.* They were wrong in thinking that in the present case they were at all bound by the case of *Bradford-on-Avon Union* v. *White* (1), or, at least, in thinking that it bound them to adopt here the lower instead of the higher figure. The two judges of the Divisional Court by which that case was decided, namely, Ridley and Channell JJ., concurred in the view that the reduced figure at which the quarter sessions ordered the gross estimated rental of the public-house there in question to be assessed was correct; but they arrived at that conclusion on different grounds, Ridley J. apparently holding that in estimating the value of the house the competition of brewers or others intending to let or sub-let it should be left out of account and only that of persons intending to occupy it themselves should be considered, while Channell J. held that brewers whether they intended to occupy the house or not should be included along with other persons as competitors, but only in so far as their competition tended to raise the market value of the house. That case, having been decided by a Court of co-ordinate jurisdiction with this Court, is no doubt binding upon this Court as a

(1) [1898] 2 Q. B 630.

decision upon its own or precisely similar facts; but as the judgments of the two judges who decided that case do not rest upon the same ground the ratio decidendi or principle of that case is not clear, and, that being so, this Court ought not to endeavour to extract from that case a ratio decidendi in order to be bound by it in a different case like the present: see per Lord Dunedin in *Great Western Ry. Co.* v. *S.S. "Mostyn" Owners* (1), nor is this Court bound by any of the dicta in that case, as they cannot be shown to be integral parts of the reasoning directed to the actual decision: per Lord Haldane in *Cornelius* v. *Phillips.* (2) Because of the divergence in the opinions of the two judges who decided *Bradford-on-Avon Union* v. *White* (3) the decision in that case ought not to be extended to any dissimilar case. In Ryde on Rating (6th ed.), pp. 611–614, the *Bradford* case (3) is discussed at length, and it is stated to be difficult to be sure of the effect of that case. If the *Bradford* case (3) involves any principle or ratio decidendi, that principle is to be found in the judgment of Ridley J. rather than in that of Channell J. The view expressed by Ridley J. is that in considering, with the object of arriving at the rateable value of the hereditament, the rent which the hypothetical tenant would pay for it, regard should be had only to tenants intending to occupy the hereditament themselves, and not to tenants intending to enter into personal contracts with third parties under which profitable business is to be carried on upon the premises; and that view is in accordance with the earlier decision in *Smith* v. *Birmingham Churchwardens* (4) and more particularly with opinions there expressed by Wills J. (5) and Lopes L.J. (6) At the time when the *Bradford* case (3) was decided only one kind of "tied house" was known—namely, a house which the brewer acquired in order to let or sublet it to a publican on condition that the latter sold the brewer's beer, and the house there in question was a tied house of that kind. The fact that a suitable house could thus be made a source of

(1) [1928] A. C. 57, 73.
(2) [1918] A. C. 199.
(3) [1898] 2 Q. B. 630.
(4) (1888–9) 22 Q. B. D. 211, 703.
(5) Ibid. 219.
(6) Ibid. 709.

profit to the brewer led to some competition among brewers for such a house, and no doubt tended to increase its rent and therefore its rateable value; but, as the brewers did not intend to occupy the house themselves, it was held in that case, in accordance with the principle there stated, that the full increase of value, owing to that competition, could not be taken into account for rating purposes. Since the date of the *Bradford* case (1) another kind of "tied house" has, however, come into existence—namely, a house which the brewer acquires and occupies himself by means of his own manager for the purpose of selling directly his own beer, and in respect of which he is unfettered by any personal contract, and the house here in question is a tied house of that newer description. A house so used may be an even greater source of profit to the brewer than a tied house of the older kind, and, consequently, in this and other districts there is now an even keener competition among brewers than there formerly was for an eligible house with a correspondingly greater increase in its rental and rateable value; and, as the brewers are now competing for the house in order that they may occupy it themselves by their own manager, it follows, according to the principle stated by Ridley J., that the full increase in the rent of the house resulting from their competition should be taken into account for the purpose of arriving at its rateable value. The *Bradford* case (1), rightly understood, is an authority for assessing the rateable value of this house not at the lower, but at the higher of the alternative figures. For the purpose of ascertaining the rateable value of a hereditament under the Rating and Valuation Act, 1925, what has to be ascertained is the rent at which the hereditament might reasonably be expected to let from year to year, or, in other words, its market value. The market value of a hereditament means its value to the highest bidder, and for the purpose of fixing that value special regard should be had to the persons and classes of persons who are prepared to make the best offers for the hereditament. As the brewers offer the best rents for this

(1) [1898] 2 Q. B. 630.

house in the open market, the rents which they offer determine its market value. In estimating the rent which prospective tenants of a particular class would be prepared to pay for the hereditament the full amount of that rent should be taken into account without regard to the motive which may induce them to pay that rent, and where that motive is an expectation of profit it does not matter whether that profit is to be earned on the hereditament which is the subject of the tenancy or elsewhere: see *Reg.* v. *L. & N. W. Ry. Co.* (1), approved in *Great Central Ry. Co.* v. *Banbury Union* (2), where Lord Dunedin observed that "a thing may have a value, although that value is not realized locally." In estimating the value of this house full effect should be given to the higher rent which the brewer would pay without regard to the fact that he offers that rent with a view to making a profit by the sale of his beer at the house.

Latter K.C. and *Michael E. Rowe* for the respondents were not called upon.

LORD HEWART C.J. This is a case stated by the court of quarter sessions for the county of Durham.

The matter arose in the following way. At a meeting of the rating appeal committee of the court on April 4 last year the company, who are here the respondents, appealed against a decision of the assessment committee, who are the present appellants, because they had refused to make an alteration in the valuation list in respect of certain premises of the respondents. The respondents on December 7, 1934, had made a proposal pursuant to the Rating and Valuation Act, 1925, for the reduction of the assessment of a public-house called the "White Lion Hotel." The assessment was 112*l.* gross value and 90*l.* rateable value. Thereupon these respondents appealed to the court of quarter sessions and that court came to a decision, subject however to this case stated.

The matter is capable of concise expression. The licensed premises referred to fall within the twofold category of what

(1) (1874) L. R. 9 Q. B. 134.

(2) [1909] A. C. 78, 93.

are popularly known as "tied" houses. The machinery of tied houses differs: its purpose is the same. In one class of cases the tied house is occupied by a tenant or sub-tenant of the brewery company under conditions which are stipulated in an agreement. In the other class of cases the tied house is occupied by a manager who is himself a servant of the brewery company. It was not, as it could not be, contended on behalf of the respondents that, for the purpose of ascertaining the rent which the hypothetical tenant might be reasonably expected to pay from year to year, brewers and the competition of brewers ought to be excluded. But what was contended was that their competition, the possibility or probability that they might become tenants, was to be taken into account only to the extent to which the market value might be likely to be thereby affected. The contention of the respondents upon the facts, which are very clearly stated in the case, and which it is unnecessary to recapitulate, was that in estimating the gross value of the hereditament the Court ought to exclude from consideration the special prices which brewers might give owing to personal considerations and not on account of the value of the premises, except so far as the possibility of such special prices being obtained raised the market value generally. I have no doubt that that contention was most carefully considered, and every word of it is important. It was not contended that brewers ought to be excluded. It was not contended even that the special prices which brewers might give, or the special prices which they might give owing to personal considerations, ought to be excluded. All that was contended was that those special prices arising from personal considerations and not governed by the value of the premises ought to be excluded except so far as the possibility of such special prices being obtained raises the market value generally. In other words, the contention was that the function of those who have to ascertain the quantum of rateability of a hereditament is to ascertain its market value. The court of quarter sessions accepted that contention and decided in favour of the respondents. They say: "We were of opinion that we were bound to follow the decision of the Divisional Court in *Bradford-on-Avon Union* v. *White* (1) and accordingly we allowed the appeal and fixed the gross value of the said hereditament at 95*l*." ; and they go on to say that, if they had not thought themselves so bound, then other considerations would have applied. In my opinion the use by the justices in quarter sessions of the word " follow " was absolutely correct. They were following and were not extending what is laid down in *Bradford-on-Avon Union* v. *White*. (1)

What did that case decide ? There the licensed premises under consideration were not premises of which the brewery company were themselves in occupation in the only way in which they could at any time be in occupation of them—namely, by means of some individual representing themselves—but were premises which the company were letting, or contemplated letting, to a tenant under a tying agreement. What was there contended on behalf of the occupier was that the special value which the brewers might concede that the premises had for them, because they were employing or about to employ the machinery of a tied house, was not the true measure of the rateable value. I read para. 7 of the case there stated : " Upon the hearing of the appeal it was alleged that in recent years there had been great competition among rival firms of brewers in the district of Bradford-on-Avon and elsewhere for the purchase or renting on lease of licensed houses for the purpose of letting or subletting them to tenants as tied houses, and of thereby increasing the sale of their beer to such tenants."

Here the question does not arise with reference to the purpose of letting or subletting of the premises by the brewery company to a tenant. It arises with reference to a case where a manager has been appointed by the brewery company to occupy the premises on their behalf. In my opinion on the question of principle there is no difference between that form of tied house where there is subletting to a tenant and that form of tied house where there is the employment of a manager. The court of quarter sessions in *Bradford-on-Avon Union* v.

(1) [1898] 2 Q. B. 630.

White (1) held " that in arriving at the gross estimated rental and rateable value it was the hereditament, independently of and without reference to any personal contract with brewers " (the question of contract only arose because *vis-à-vis* the tenant there was an agreement with the tenant) " that had to be assessed—in fact, the ' free ' house, not excluding brewers as competitors, but treating them, like other tenants from year to year, as tenants of an hereditament unfettered by any personal contract (2)." So regarding the matter, the Court arrived at a particular assessment. The question was whether that assessment was right. This Court held that it was right, and that the principle which had been applied was right. What was that principle? It is made clear, I think, especially, in certain parts of the judgment of Channell J., which it may be useful to recall. One of these passages is as follows: " The Act of 1836 says nothing about the hypothetical tenant occupying. The purpose for which a particular tenant wants the premises may possibly induce him to pay more than the market value for them; but, unless that is the case, the purpose for which the tenant wants the premises has nothing to do with the matter, except in this way—that property is to be rated, as it is said, ' rebus sic stantibus '—that is to say, a public-house is to be rated on the assumption that it continues a public-house, and the question is not to be entered into as to whether a higher rent could be got for it by turning it into a bank, or an insurance office, or any other kind of business premises. To introduce the purpose for which the tenant is about to use the premises, and to consider whether that purpose is to carry on the trade himself or to underlet it to some one else to carry it on, seems to me to introduce extraneous considerations somewhat similar to those which it was attempted unsuccessfully to introduce in *Dodds* v. *South Shields Assessment Committee* (3)." (4) That sentence, it seems to me, would have precisely the same force and truth if, after the word " himself " one were to introduce the words " personally or by a manager "; so that the sentence would read: "to consider whether that purpose is to carry on the trade himself personally or by a manager, or to underlet it to some one else to carry it on, seems to me to introduce extraneous considerations."

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(1) [1898] 2 Q. B. 630.

(2) Ibid. 633.

(3) [1895] 2 Q. B. 133.

(4) [1898] 2 Q. B. 630, 637.

A little later Channell J. said: "I think that any circumstances which affect the annual value in the market must be taken into consideration in arriving at the gross estimated rental—that is, at the sum which may reasonably be expected to be obtained from a tenant from year to year; and therefore the demand which exists for public-houses, whether by brewers or others, must be considered, for that demand directly affects the value. The contention of the appellant is, however, well founded to this extent—any sums which are paid by the tenant, not by reason of the value of the premises, but for reasons personal to himself, ought not to be taken into account." (1) There I think is a clear contrast pointed in the simplest possible words.

Yet again Channell J. said: "The contention of the respondents, which is stated in para. 12 of the case, appears to me to be correct, subject only to the doubt as to what is meant by the 'competition of brewers being taken into consideration.' If that means that the question should be considered whether the competition of brewers had raised the market value of public-houses in the district, then, in my opinion, it is right. If, however, it means that the special values which the brewers may, for reasons connected with their own business, be willing to give are to be treated as the gross estimated rental of the premises, because those sums might be obtained from brewers, then, in my opinion, it is wrong." (2) In other words, the duty of those who have to assess the amount of the gross rate is to take into account all relevant considerations; that is to say, all matters which may directly affect the value, but to exclude others.

That is made final and perfectly plain by this further passage: "The paragraph continues:"—that is to say, the paragraph in that special case—"'but treating them,'"—that is the brewers—"'like other tenants from year to year, as tenants of an hereditament unfettered by any personal contract.' That statement is not quite clear. The brewers would not in any case be fettered by a personal contract, and the house is necessarily free when they take it. It probably means, not taking into account any sums over and above market value, which the brewers might be willing to give for purposes of their own to carry out their object of making it a tied house. In that view the decision of the court of quarter sessions is right." (1)

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(1) [1898] 2 Q. B. 638.

(2) Ibid. 639.

In my opinion the principle which is there laid down is no less accurate where the machinery employed by the brewery company is not the machinery of a tied house agreement, but is that tied house machinery whereby a manager is placed in the premises. Those who are assessing the value must not take into account any sum over and above the market value which the brewers might be willing to give for purposes of their own to carry out their object of making the house a tied house—a tied house here in the hands of a manager.

If I thought that the view which the court below had been invited to take and did take was a view extending the principle as laid down in *Bradford-on-Avon Union* v. *White* (2), or if I thought it was necessary for this Court in dealing with this case to extend the principle therein laid down, I should like to hear further argument. But, in my view, what the court below was asked to do and did was to follow that decision—the point being that the mere difference between the tied house which is in the hands of a manager and the tied house which is in the hands of a tenant is, except for the incident of the agreement, immaterial.

Taking that view, I think that the court of quarter sessions came to a true conclusion, and that the principle laid down very clearly by Channell J. in *Bradford-on-Avon Union* v. *White* (2) applies mutatis mutandis, and the degree of the mutation is very slight, to the present case.

I think, therefore, that the present appeal fails and ought to be dismissed.

(1) [1898] 2 Q. B. 640.

(2) [1898] 2 Q. B. 630.

1936

ROBINSON BROTHERS (BREWERS), LD. *v.* HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE.

HUMPHREYS J. I agree in the judgment which my Lord has pronounced and with the reasons expressed in that judgment.

DU PARCQ J. I agree. I have no doubt that we are bound by the decision in *Bradford-on-Avon Union* v. *White* (1), and I feel no regret at finding myself so bound, because, if I may say so with great respect, it seems to me that the judgments in that case were in accordance with principle.

If one looks for a moment at the Rating and Valuation Act, 1925, and considers the facts in this case apart from authority, one finds that what has to be ascertained is the rent at which the hereditament might reasonably be expected to let from year to year. (2) The hereditament in this case is a public-house. What has to be considered is the value of that public-house to its owner, that is to say, what he may reasonably expect to get as rent for it from a tenant from year to year. It happens in this case that the public-house is at present occupied by brewers, who carry on business there through a manager. It is impossible not to be impressed by that fact, but theoretically and ideally the rateable value should be just the same if the house is occupied by brewers who carry on business in it through a manager, as it would be if the house were occupied and the business carried on by a tenant of brewers as what is called a tied house, or if it were occupied and the business carried on by a licensee who is independent of any brewers. The only question is, what would a tenant from year to year be likely to pay as rent ?

It appears from this case stated that it is very common in these days to find public-houses in the assessment area in question owned by brewers and either managed by them or sublet to tied tenants. That is clearly a matter of importance to the owner of premises of this kind. He is entitled to say when he is seeking a tenant for his premises that there is at any rate a possibility and it may be a probability that he will find brewers prepared to take those premises, and to carry on business in them through a manager. No owner who had any prudence or foresight would say that

(1) [1898] 2 Q. B. 630.

(2) See s. 22, sub-s. 1.

1936

ROBINSON BROTHERS (BREWERS), LD. *v.* HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE.

du Parcq J.

there was a certainty that he would find such a tenant; and if every owner of licensed premises, however excellent they might be, were to say to himself that he was certain to have such a tenant, I think that some, at any rate, of them would be likely to be disappointed. Looking at the matter in that way, it seems to me that a court of quarter sessions would clearly be wrong if they were to say that they must assume that brewers will be found as tenants from year to year, and will carry on business on these premises and make considerable profits, and therefore be able and willing to pay a very high rent. What they ought to say is that they must not overlook the possibility that such a tenant may be found, and, in considering what is the rent which a tenant from year to year would be likely to pay they must not forget the possibility, which may or may not amount to a probability—that is a question of fact—that brewers will come forward who anticipate that they will make large profits if they can carry on business upon these premises. That latter course is the course which has been taken by the court of quarter sessions in this case. They have, as appears from sub-para. (*f*) of the case, excluded the rents which the brewers might be expected to give in order to secure the use of the premises, and, in that way, a larger output and profit, " except so far," and this is a most important exception, " as the possibility of such rents being given raises the rent which might reasonably be expected to be given by a tenant not influenced by these reasons." In other words they have said that they will not assume that such a tenant will be found, but that they will not forget that the fact that there are such potential tenants may, perhaps must, keep up the rental value of premises of that kind. When the case is read as a whole, it seems to me to show plainly that no relevant matter has been excluded from consideration by the court of quarter sessions, and I should have thought, apart from authority, that the view they have taken was right.

I agree with my Lord, however, as I have said, in thinking that we are bound by the authority of *Bradford-on-Avon Union* v. *White.* (1) I say no more about the judgment in

(1) [1898] 2 Q. B. 630.

that case of Channell J., which seems to me precisely to cover this case in principle, except to add that I am not in agreement with the submission of Mr. Comyns Carr that there was a real or substantial difference between the views of Ridley J. and Channell J. I do not think it is right to say that Ridley J. based his judgment on the fact that in that case the brewers were not tenants. I find that he said: "The hypothetical tenant is to be a tenant supposed to take the hereditament as it stands, and used as it is, so far as the use of the premises goes—that is to say as a public-house, as ironworks, or a dwelling-house, as the case may be; but, whilst that is true, the value of the hereditament is not to be affected by contracts or conditions not directly bearing on the occupation or use of the property, but of a personal and collateral character." (1) I have no doubt that if Ridley J. had been presented with the facts of this case instead of those of the case before him, he would have said that this was a case where the value of the hereditament is not to be affected by conditions which do not directly bear on the occupation or use of the property; the conditions here being that the brewers are occupying the premises and carrying on business there through a manager, and that by reason of the fact that they so carry on business they are able to secure a larger output and the profits thereon. I have no doubt that Ridley J. would have intended those words "or conditions" to cover such a case as this. I see no disagreement in principle between the two learned judges in that case, and I think that the headnote accurately sets out the principle, and that the difference between the tied house and the house where the business is carried on by a manager to the brewers is, for the purposes of this case and *Bradford-on-Avon Union* v. *White* (2), an irrelevant distinction.

For these reasons I agree with the judgment of my Lord.

Appeal dismissed. Leave to appeal.

Solicitors for appellants: *Richardson, Sadler & Co.*

Solicitors for respondents: *Godden, Holme & Ward.*

J. R.

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(1) [1898] 2 Q. B. 630, 635.

(2) Ibid. 630.

1936
April 21.

LONDON COUNTY COUNCIL *v.* CAMBRIDGESHIRE COUNTY COUNCIL.

Local government—Mental deficiency—Mental defective found guilty of offence—Ordered to a certified institution—Place of residence—Presumption—Authority responsible for maintenance of mental defective—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 43, 44.

By s. 43, sub-s. 1, of the Mental Deficiency Act, 1913: "Where a person is ordered to be sent to a certified institution . . . . the local authority responsible for providing accommodation for that person . . . . shall be the council of the county or county borough in which he resided. . . . ."

By s. 44, sub-s. 1: "Where the order is made in respect of a person found guilty of an offence, that person shall for the purposes of the provisions of the last preceding section be presumed to have resided in the place where the offence was or was alleged to have been committed, unless it is proved that he resided in some other place."

A mental defective was convicted of larceny at Cambridge and was ordered to be sent to a certified institution. He was born in 1913, and had lived in London until he was eighteen years of age. He then left home and wandered about the country, being employed on occasional work at different places. He had on occasions stayed in casual wards in different parts of the country. He had no settled residence for any length of time at any particular place. In May, 1935, he came into Cambridge, and committed the offence of which he was ultimately convicted:—

Held, that as it was not proved that the mental defective resided in some place other than the place where the offence was committed, s. 44, sub-s. 1, of the Act applied, and he was presumed for the purposes of s. 43, sub-s. 1, to have resided in the place where the offence was or was alleged to have been committed. Therefore, the local authority responsible for providing for his accommodation was the Cambridgeshire County Council.

Held, also, that no case of doubt had arisen with regard to his place of residence, and therefore no question of poor law settlement within s. 44, sub-s. 4, had to be considered.

Berkshire County Council v. *Reading Borough Council* [1921] 2 K. B. 787 followed.

CASE stated by Cambridge justices.

On June 13, 1935, one Frederick George Dorrington, being a defective within the meaning of the Mental Deficiency Acts, 1913 to 1927, was found guilty of larceny and was ordered to be sent to a certified institution. It was further ordered, in accordance with the provisions of ss. 43 and 44, sub-s. 1, of the Mental Deficiency Act, 1913 (1), that the London County Council ("the appellants") should be the local authority responsible for providing accommodation for the defective as being the council of the county in which he resided.

Under the provisions of s. 44, sub-s. 3, of the Mental Deficiency Act, 1913, and the Summary Jurisdiction (Mental Deficiency Act) Rules, 1933, the appellants applied for an order that the liability in respect of the defective be transferred to the Cambridgeshire County Council (the respondents), and that the respondents should repay to the appellants any expenses incurred.

On the hearing of the appeal the following facts were proved or admitted :—

The defective was born on March 23, 1913, and lived with his mother at Islington, London, until attaining the age of eighteen. He then left home, and thereafter up to May 24, 1935, wandered about the country, paying occasional short visits to his mother's home, amounting to about ten days in 1931, about four days in 1932 or 1933, a few days at Christmas, 1934, and one day in March, 1935. Since March, 1935, he had not been to his mother's home, nor had he been seen by any relations. Since leaving home at the age of eighteen the defective had, while wandering about the country, been employed on occasional work at different places, and he had on occasions stayed in casual wards in different parts of the country. During that period, so far as the information then obtainable showed, he had had no settled residence for any length of time at any particular place. On May 24, 1935, he came into the borough of Cambridge, having, so far as could be ascertained, slept in the open the night before. The only information on that point had been supplied by him to the police. While in the borough he committed the offence of larceny, of which he was convicted on June 13, 1935, and left the borough immediately afterwards. At the time when the offence was committed his poor law settlement was in the county of London, but there was no proof that he resided there or in any other place.

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(1) The material parts of s. 43, sub-s. 1, and s. 44, sub-s. 1, of the Act are set out in the headnote.

Sect. 44, sub-s. 4, provides as follows: "(4.) In the case of doubt as to where a person resides the expression 'place of residence' in this section shall be construed as the county or county borough (as the case may be) in which the person would, if he were a pauper, be deemed to have acquired a settlement within the meaning of the law relating to the relief of the poor."

On the part of the respondents it was contended that a case of doubt had arisen which brought the matter within s. 44, sub-s. 4, of the Mental Deficiency Act, 1913, and that the place of residence of the defective should be construed as being his place of poor law settlement, which had been proved or admitted to be the county of London. On the part of the appellants it was contended that no case of doubt had arisen within the above sub-section, on the ground that, as it had not been proved that the defective resided in some other place, the provisions of sub-s. 1 applied.

The justices held that, as there was doubt as to the defective's place of residence, s. 44, sub-s. 4, of the Mental Deficiency Act, 1913, applied, and that the appellants were the local authority responsible for the purpose of s. 43, as being the authority in whose area the defective had acquired a poor law settlement.

The London County Council appealed.

Vernon Gattie for the appellants. The local authority responsible for providing accommodation within the meaning of s. 43 is the Cambridgeshire County Council. Sect. 44, sub-s. 1, applies to the facts of this case. There is no evidence that the mental defective did not reside in the place where the offence was committed, and in the absence of proof that he resided in some other place the presumption referred to in s. 44, sub-s. 1, applies. The mental defective must be presumed to have resided in Cambridge for the purpose of s. 43, sub-s. 1. See *Berkshire County Council* v. *Reading Borough Council* (1); *London County Council* v. *Wilts County Council* (2); *Kent County Council* v. *London County Council.* (3)

(1) [1921] 2 K. B. 787.
(2) (1927) 91 J. P. 122.
(3) (1915) 84 L. J. (K. B.) 1781.

Arthur Capewell for the respondents. This is a case in which there is a doubt about the place of residence of the mental defective, and s. 44, sub-s. 4, applies. There was evidence which justified the justices in arriving at the conclusion that there was a doubt about the defective's place of residence. The justices found that the man did not reside in London, but he had lived and had had occasional employment in different places and different parts of the country. Length of time was immaterial on the question of residence. This case can only be dealt with under s. 44, sub-s. 4, and the justices were right in holding that the London County Council was the authority responsible within s. 43 for the accommodation of the defective.

[*Stoke-on-Trent Borough Council* v. *Cheshire County Council* (1) was referred to.]

LORD HEWART C.J. I am clearly of opinion that this appeal must succeed. The words of s. 44, sub-s. 1, of the Mental Deficiency Act, 1913, are completely free from ambiguity. The sub-section provides that: "Where the order is made in respect of a person found guilty of an offence, that person shall for the purposes of the provisions of the last preceding section be presumed to have resided in the place where the offence was or was alleged to have been committed, unless it is proved that he resided in some other place." No words could be plainer to show that, for the purpose of ascertaining which local authority should be responsible for the accommodation of the person convicted, the presumption applies unless it is proved that he resided in some other place. Here there was undoubtedly an attempt to prove that the person referred to, Dorrington, did reside in some other place; but, as the case stated shows, the attempt failed, and at the conclusion of the whole matter there was no proof that Dorrington resided in some place other than the place where the offence was committed. It follows that under s. 44, sub-s. 1, he is presumed to have resided in the

(1) [1915] 3 K. B. 699.

place where the offence was committed, that is to say, Cambridge.

A difficulty has been suggested with regard to the application of sub-s. 4 of that section: "In the case of doubt as to where a person resides the expression 'place of residence' in this section shall be construed as the county or county borough (as the case may be) in which the person would, if he were a pauper, be deemed to have acquired a settlement"; but, as was stated by Avory J. in *Berkshire County Council* v. *Reading Borough Council* (1): "It appears to me that until and unless a doubt arises as to where a person resides, no question of Poor Law settlement has to be considered at all. It is only to be considered where there is a doubt as to where the person in question resides in the ordinary sense of the term, without any technical meaning attached to the word such as is to be found in decisions relating to Poor Law settlements."

It is conceivable (I am not going to imagine cases) that the terms of sub-s. 4 may refer to a case that would otherwise come within sub-s. 1, but in this case it does not seem to me to be possible. The attempt to prove that Dorrington resided in some other place having failed, it seems to me that the presumption clearly set out must arise and that therefore the decision of the justices was erroneous in point of law, and that the order ought to have been made that the liability in respect of Dorrington should be transferred to the Cambridgeshire County Council and that they should repay to the appellants any expenses incurred by them in respect of the said Dorrington.

DU PARCQ J. I agree.

GODDARD J. I agree.

Appeal allowed.

Solicitor for the appellants: *J. R. Howard Roberts.*

Solicitor for the respondents: *Ashley Tabrum, Cambridge.*

T. W. M.

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(1) [1921] 2 K. B. 787, 795.

IZZARD *v.* UNIVERSAL INSURANCE COMPANY, LIMITED.

1936
March 30.

Insurance (motor)—Third party liability—Insurance of owner of motor vehicle in respect of death of person caused by use thereof—Insurer not to be liable in respect of person carried other than passenger carried by reason of contract of employment—" Contract of employment " whether with insured person only or with any employer—Provisions in policy purporting to exclude personal risk—Validity—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 1 (*b*) (*i.*) (*ii.*).

The Road Traffic Act, 1930, s. 36, sub-s. 1, provides that in order to comply with the requirements of the part of the Act providing against third party risks " a policy of insurance must be a policy which . . . . (*b*) insures such person . . . . as may be specified in the policy in respect of any liability which may be incurred by him . . . . in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road: Provided that such a policy shall not be required to cover—

(i.) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii.) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise" :—

A policy of insurance in respect of a motor vehicle was headed " Commercial motor vehicle policy." It incorporated a previous proposal by the insured in which he had given a warranty or undertaking that passenger risk was not to be covered, it contained in the schedule thereto a warranty that the vehicle should be used only for general haulage and other trades, and it purported to exempt the insurer from liability in respect of any accident caused whilst the vehicle was being used otherwise than for the purposes mentioned in the schedule. The policy further provided that the company would indemnify the insured against liability in respect of " Death of or bodily injury to any person caused by or arising out of the use of the vehicle . . . . Provided always that the company shall not be liable in respect of . . . .; (*b*) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (*c*) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . . such vehicle."

Held, that, on the true construction of these provisions, the expression "contract of employment" in sub-cl. (ii.) in the Act and sub-cl. (*c*) of the policy was not limited to a contract of employment between the deceased or injured passenger and the insured person, but applied to a contract of employment between such passenger and any employer.

Held, further, inasmuch as the Road Traffic Act, 1930, s. 36, made it obligatory, except as therein provided, that a policy against third party risks should cover liability in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle, that, notwithstanding that the heading of and warranties in the policy purported to eliminate passenger risk, the insurer was liable to indemnify the insured against liability for the death of a passenger carried in the vehicle by reason of or in pursuance of a contract of employment.

SPECIAL CASE stated by an arbitrator.

By a policy dated November 30, 1933, and headed "Commercial motor vehicle policy," the Universal Insurance Company, Ld., hereinafter called "the company," insured one William Druce, of Didcot, hereinafter called "the insured," described therein as a "haulage contractor, dairyman, sand and gravel merchant, coal merchant, and farmer," in respect of a commercial motor vehicle, therein described as a Fordson truck, and it was therein provided, among other things, as follows :—

"SECTION II. LIABILITY TO THIRD PARTIES.

"(I.) The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of :—

Death of or bodily injury to any person caused by or arising out of the use" of the said truck . . . .

"Provided always that the company shall not be liable in respect of :—

(*a*) . . . . ;

(*b*) Death of or bodily injury to . . . . . any person in the employment of the insured arising out of and in the course of such employment ;

(*c*) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . . such vehicle at the time of the occurrence of the event out of which any claim arises ; . . . . "

Under the heading "General Exceptions of the Policy" it was provided :

"The company shall not be liable in respect of :—

(1.) Any . . . . liability caused, sustained or incurred whilst such vehicle is :

(*a*) . . . . being used otherwise than for the purposes mentioned in the Schedule hereto . . . . or is being used for hire or reward. . . . .

(3.) Any contractual liability."

The Schedule contained the words : "Warranted used only for general haulage and other trades."

By a proposal form dated November 17, 1933, which was stated in the policy to be the basis of the contract and incorporated therein, William Druce, in stating the benefits he required, had answered the question : "Is passenger risk to be covered ?" with the word "No."

The policy complied with the requirements of the Road Traffic Act, 1930, s. 36, sub-s. 1 (*b*) (ii.), and the proviso contained in Section 2, clause (1.) (*c*), of the policy followed the wording in that sub-section.

By a verbal contract made in April, 1934, between Industrial Builders, Ld., hereinafter called "the builders," then developing a building estate at Coventry, of the one part, and the insured of the other part, the insured agreed to do haulage work for the builders between Didcot and Coventry and to put a lorry at their disposal for the conveyance of workmen between these places at the week ends for 35*s*. per journey whether men were carried or not.

By a verbal contract made in April, 1934, between the builders and Bernard George Izzard, a carpenter, who lived near Didcot, it was provided that he should work for them at Coventry on the terms that he should get a certain rate of pay and that a lorry should be at his disposal for going home at week ends.

On July 21, 1934, Izzard was being carried home on the insured's said motor truck driven by the insured's servant when it overturned.

On July 22, 1934, Izzard died, his death having been caused by or arising out of the use of the motor truck on the previous day.

The widow of the deceased brought an action for damages against the insured on behalf of herself and other dependents of the deceased under the Fatal Accidents Acts, 1846–1908, in respect of his death, and on January 18, 1935, at Reading assizes, she recovered judgment against the insured for 850*l.* and costs.

On February 19, 1935, the insured was adjudicated bankrupt.

By the Third Parties (Rights against Insurers) Act, 1930 (20 & 21 Geo. 5, c. 25), s. 1, the rights of the insured against the company under the policy were transferred to and vested in the widow of the deceased.

The widow claimed from the company, but the company did not pay to her, the amount of the judgment.

By an agreement dated August 24, 1935, between the company and the claimant, differences between them as to her rights under the policy were submitted to arbitration.

The arbitrator found as facts that the deceased was employed by the builders upon the terms above stated from about April, 1934, until his death, that he went home to Didcot from Coventry every Saturday and returned from Didcot to Coventry every Monday during that period as a passenger carried on the said motor truck by reason of or in pursuance of a contract of employment, that whilst being so carried on July 21, 1934, his death was caused by or arose out of the use of that motor truck, and that at the time his death was caused that motor truck was being used for a purpose mentioned in the schedule to the policy.

On the facts and findings of fact the arbitrator held that the claimant was entitled to recover from the company the amount of the judgment, and he awarded that the company should pay to the claimant 850*l.* and the costs of her action against the insured, and further that the company should pay the claimant's costs and the costs of the award.

The question for the Court was whether the decision of the arbitrator was correct.

Tristram Beresford K.C. for the insurance company, appellants. The appellants are not liable to the respondent in respect of the death of the deceased.

The respondent has no right as against the appellants except such right against them as belonged to Druce, the insured, and as was transferred from him to her under the Third Parties (Rights against Insurers) Act, 1930. The insured had no right against the appellants under the policy. The policy is headed "Commercial Motor Vehicle Policy"; it recites that a proposal previously made by the insured is to be the basis of the policy and incorporated therein, in which proposal it is stated that personal risk is not to be covered by the insurance; its schedule contains a warranty by the insured that the vehicle is to be used "only for general haulage and other trades"; and the General Exceptions, sub-s. (1) (*a*), provide that the appellants shall not be liable in respect of any accident caused whilst the vehicle is being used otherwise than for the purposes mentioned in the schedule to the policy. The policy, therefore, indemnifies the insured against liability in respect of property only and not in respect of the death or injury of persons. The insured in carrying passengers upon the vehicle was not using it in accordance with the policy, and the appellants are not bound to indemnify him against liability for the death of a person so carried. If the policy did not wholly exclude liability in respect of the death or injury of a person, it imposed it only in certain cases. The policy in section 3, sub-s. 1, provides generally that the insurance company, the appellants, will indemnify the insured against liability in respect of the death of any person caused by or arising out of the use of the vehicle. But the proviso to that sub-section states that the company shall not be liable in respect of "(*b*) Death of . . . . any person in the employment of the insured arising out of and in the course of such employment; (*c*) Death of . . . . any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . . such vehicle . . . ." The latter of these clauses, if the words in brackets be omitted, would relieve the appellants from liability in respect of the whole class of persons carried in the vehicle. The words in brackets exempt from that class of persons, and leave the appellants liable for, passengers carried by reason of a "contract of employment." Clauses (*b*) and (*c*) of the proviso ought, however, to be read together, and when they are so read the expression "contract of employment" must mean the same contract of employment as is contemplated by clause (*b*), namely, a contract of employment with the insured. The words in brackets in clause (*c*), therefore, only render the insurers liable for the death of a person carried in the vehicle who is so carried by reason of or in pursuance of a contract of employment with the insured. In the present case, as there was no contract of employment between the insured and the deceased, the latter was not carried in the vehicle in pursuance of a "contract of employment" within the meaning of that expression in the proviso, and the appellants are not therefore liable in respect of his death.

Under the heading "General exceptions of the policy," it is provided that the company shall not be liable in respect of: (1.) any liability incurred whilst the vehicle is (*a*) being used otherwise than for the purposes mentioned in the schedule to the policy, or is being used for hire or reward; (3.) any contractual liability. By virtue of these provisions the appellants are exempted from liability in respect of the death of the deceased on several grounds—namely, because at the time of the accident the vehicle was being used otherwise than for the purposes mentioned in the schedule, where it is warranted that it is to be used only for general haulage and other trades; because at that time the vehicle was being used for hire or reward, inasmuch as the insured received from the builders a payment of so much a journey; and because the liability was a contractual liability. The Road Traffic Act, 1930, s. 36, sub-s. 1 (1), provides that a policy

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(1) The sub-section so far as material is set out above in the beginning of the headnote.

1936

Izzard
v.
Universal
Insurance
Co.

must insure the person specified therein against liability in respect of the death of any person caused by the use of the vehicle on the road: "provided that such a policy shall not be required to cover—(i.) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy . . . .; or (ii.) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of . . . . persons being carried in or upon . . . . the vehicle." (1) From that sub-section, it would seem, sub-s. 1 of section II of the policy has been copied, and, that being so, both the sub-sections should be similarly construed. In clause (ii.) of the proviso to the statutory sub-section, as in clause (*c*) of the proviso to the sub-section in the policy the expression "contract of employment" should be construed as meaning a contract of employment with the person insured and with no one else. The words "arising out of and in the course of his employment" in clause (i.) of the statutory proviso would seem to indicate that the object of that clause is to relieve the insurer from liability to the extent to which the deceased employee is entitled to compensation under the Workmen's Compensation Act. The omission of these words from clause (ii.) may be for the purpose of meeting the case in which the claim in respect of the deceased employee exceeds the amount of his compensation under that Act.

Samuels K.C. and *F. Soskice* for the claimant, respondent. The respondent is entitled to be indemnified by the appellants in respect of the death of the deceased.

The Road Traffic Act, 1930, s. 36, sub-s. 1 (*b*) (i.), provides in effect that a policy of insurance against third party risks arising out of the use of motor vehicles must insure the person specified in the policy against his liability for the death of or bodily injury to any person caused by the use of the motor vehicle, except as therein otherwise provided. Any warranties or undertakings in a policy, such as those in the policy here in question, which purport to exclude the liability of the insurer in respect of personal risk and to limit his liability to goods or property, are therefore contrary to the requirements of the Act and must be treated as void. On the true construction of this policy, Section II, sub-s. (1), proviso, clauses (*b*) and (*c*), the expression "contract of employment," in the bracketed words of clause (*c*), is not limited to a contract of employment with the insured person, but applies to a contract of employment with any person. To limit that expression in clause (*c*) in that way would be to make it unnecessary, as the case of the death of a person in the employment of the insured is already provided for by clause (*b*). The findings of the arbitrator bring this case exactly within the words in brackets in clause (*c*), and, therefore, take it out of the proviso exempting the company from liability and keep it under the general provision of sub-s. (1) obliging the company to indemnify the insured against liability in respect of the death of any person caused by or arising out of the use of the vehicle. This case does not come within the General Exceptions of the policy, sub-s. (1), clause (*a*), which provides that the company shall not be liable in respect of any accident caused while the vehicle is being used for hire or reward. The insured's vehicle, in so far as it was used for the carriage of passengers, was not used for hire or reward inasmuch as the same fare of 35*s*. per journey was paid by the builders to the insured whether men were carried on the vehicle or not. If the insured had paid the claim of the respondents he would clearly have had a right to be indemnified by the appellants, and on his bankruptcy that right was transferred to and vested in the respondent under the Third Parties (Rights against Insurers) Act, 1930.

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(1) The sub-section so far as material is set out above in the beginning of the headnote.

MACKINNON J. This case raises a short but difficult point. On July 21, 1934, a man named Bernard George Izzard was riding as a passenger in a lorry belonging to one William Druce on a journey between Coventry and Didcot, when unhappily the lorry upset, and as a result of the accident the unfortunate man was killed. Thereupon his widow, Mrs. Izzard, brought an action under Lord Campbell's Act against William Druce, in which, on January 18, 1935, she recovered judgment for 850*l.* damages and costs. On February 19, 1935, William Druce became bankrupt, but a policy of insurance had been issued to him in respect of the lorry by the Universal Insurance Company, the respondents in this case, and Mrs. Izzard, taking advantage of the Third Parties (Rights against Insurers) Act, 1930, made her claim against the respondents for the amount of her judgment against William Druce, the insured.

The policy is headed: "Commercial motor vehicle policy;" its schedule contains the words: "Warranted used only for haulage and other trades"; and in its operative part, Section II as to liability of the assured to third parties, the first sentence is "The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of: Death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule." If the policy stopped there, the company would, I think, obviously be bound to indemnify the insured against his liability at law for the death of Izzard, a person whose death was caused by the use of the insured vehicle, and Mrs. Izzard under the Third Parties Act of 1930 would clearly have a right to assert against the company their promise to indemnify the insured. But the company in answer to the claim of Mrs. Izzard point out that the statement in the policy that they will indemnify the insured is subject to a proviso: "Provided always that the company shall not be liable in respect of" various things, including: "(*b*) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment," and "(*c*) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises." The company say that though they have promised to indemnify the insured against the death of a person caused by the use of the vehicle, yet in the case of Izzard that liability is excluded by the proviso, because his death was the death of a person being carried in or upon the vehicle, and he was not a passenger carried by reason of or in pursuance of a contract of employment. In answer to that contention of the company it is said on behalf of Mrs. Izzard that the proviso does not exempt the company from liability because her husband was a passenger carried by reason of or in pursuance of a contract of employment.

The circumstances in which the deceased was being carried in the insured's lorry at the time of this unfortunate accident are fully stated in the special case, and may be summarized as follows: By a contract made in April, 1934, between Industrial Builders, Ld., who were then developing a building estate at Coventry and William Druce the insured, the latter agreed to do haulage work for the former between Didcot and Coventry, and to put a lorry at their disposal for the conveyance of workmen between Coventry and Didcot at the week ends for 35*s.* per journey, whether men were carried or not; and by a contract of employment made about the same time between Industrial Builders, Ld., and the deceased who lived near Didcot, the deceased agreed to work at Coventry for the builders on the terms that he should get a certain rate of pay, and that a lorry would be at his disposal if he desired to go home at week ends. The arbitrator has found that in fact the deceased was being carried in this vehicle by reason of and in pursuance of his contract of employment with Industrial Builders, Ld.

Those being the circumstances, the point of law that arises in this case depends upon the true construction of those few words of the policy, Section II, sub-s. (1), proviso, cl. (*c*), " other than a passenger carried by reason of or in pursuance of a contract of employment." If in that clause the words " contract of employment " mean a contract of employment with any employer, then the deceased was being carried as a passenger in this vehicle by reason of a contract of employment—namely, his contract of employment with Industrial Builders, Ld. If, however, the true meaning of the words "contract of employment" is a contract of employment with the insured, then clearly, as there was no contract of employment between the deceased and William Druce, the deceased was not being carried as a passenger in this vehicle by reason of a contract of employment.

It is obvious that in the policy, Section II, sub-s. (1), proviso, the wording of the two clauses (*b*) and (*c*) to which I have referred is copied practically verbatim from the Road Traffic Act, 1930, s. 36, sub-s. 1, proviso, clauses (i.) and (ii.); and the real question in this case is, what is the meaning of the words "by reason of or in pursuance of a contract of employment" in the Act, s. 36, sub-s. 1 (*b*), proviso, cl. ii.

At first sight the argument put forward by Mr. Tristram Beresford seems somewhat attractive—namely, that, when the Act and the policy deal with contracts of employment they must be referring to contracts of employment made by the insured person, since the whole of the provisions relate to his position and liabilities. But one thing that is most noticeable and, as I think, significant, is the contrast between the two clauses (i.) and (ii.) of the proviso in the Act, and also between the two clauses (*b*) and (*c*) of the proviso as copied in the policy. Thus, to take the clauses of the latter proviso, clause (*b*) speaks of the death of any person "in the employment of the insured." Clause (*c*) on the other hand speaks of the death of any person other than a passenger carried by reason of or in pursuance of "a contract of employment." The latter clause does not speak of a contract of employment "with the insured." If it had been meant that the contract of employment dealt with in that clause should be a contract of employment with the insured, I think it is almost inevitable that the draughtsman who drew, or Parliament who enacted, this proviso, would have used in that clause the words "with the insured," just as they had in the earlier clause used the words "in the employment of the insured." Furthermore, if clause (*c*) of the proviso "carried by reason of or in pursuance of a contract of employment" means a contract of employment with the insured, it is difficult to see why it would not be merely repeating the words in clause (*b*) of the proviso, "any person in the employment of the insured."

Mr. Beresford suggests that clause (i.) of the statutory proviso, and the corresponding clause (*b*) in the policy, refers to a liability, in respect of a person in the employment of the insured, coming under the Workmen's Compensation Act, and the words "arising out of and in the course of his employment" clearly point to such a liability being in contemplation. It seems to me, however, that liability under clause (ii.) in the Act and the corresponding clause (*c*) in the policy in respect of a person carried by reason of a contract of employment would none the less be within those words; and the only reason according to Mr. Beresford for the repetition of the provision in the later clause is to cover the case of an employee earning more than the limit of wages or salary which would entitle him to claim under the Workmen's Compensation Act. I agree that it may be rather difficult precisely to understand what was in the contemplation of the Legislature in making it incumbent upon the owner of a motor vehicle to insure against liability in respect of a passenger carried by reason of a contract of employment with the insured or by reason of a contract with someone else. But I am only concerned with the proper construction of the words that are actually used.

I see no reason for adding the three words "with the insured" after the words "contract of employment" in clause (ii) of the proviso in the Act, or in clause (*c*) of the proviso in the policy. If these words are not added, I think that it is clear that the company is not protected by the proviso from liability in respect of the death of the deceased. The arbitrator has found as a fact, and his finding can be subject to no dispute or appeal, that the deceased was in fact being carried in pursuance of a contract of employment with Industrial Builders, Ld. That being so, when the deceased was riding on the motor vehicle he was a passenger carried in pursuance of a contract of employment within the meaning of the exception to the proviso in clause (*c*) of the policy; consequently the proviso that the company shall not be liable in respect of his death does not apply; and therefore in the clear terms of the policy, the company became bound to indemnify the insured, and by reason of the Third Parties (Rights against Insurers) Act, 1930, they must indemnify Mrs. Izzard in respect of the death of her deceased husband which was caused by or arose out of the use of the vehicle.

There is one other matter to which I ought to refer. The policy is headed "Commercial Motor Vehicle Policy"; it recites at the beginning that the insured, Druce, has made a proposal and declaration which shall be the basis of the contract of insurance; and in that proposal, in answer to the question "Is passenger risk to be covered?" he answers "No." It is therefore said on behalf of the company that the basis of this policy is that the company shall not be liable for the death of or injury to passengers. But the insured himself and the company were both subject to the obligations of s. 36 of the Road Traffic Act, 1930, and notwithstanding that warranty or undertaking by the insured that his vehicle would not be used for carrying passengers, it is clear that the company has to, and does by the policy, Section II, "Liability to Third Parties," undertake that it will indemnify him against liability for the death or injury of any person who is in fact a passenger being carried in pursuance of a contract of employment. The whole policy must be read together, and the passage in question in Section II, relating to liability to third parties, must of course be read as meaning that, notwithstanding anything that has been warranted as regards the user of the vehicle and any promise by the insured that he did not intend to use it for carrying passengers, yet as the Act requires him to be insured, so the company will insure him against liability to a passenger who is carried in pursuance of a contract of employment.

As I have said, the question is not an easy one. It turns essentially upon the meaning of those few words "by reason of or in pursuance of a contract of employment." I think that the construction which the learned arbitrator put upon those words was right, and, therefore, that his award should

1936

Izzard v. Universal Insurance Co.

be upheld. The insurance company must pay the costs of the hearing.

Appeal dismissed.

Solicitors for the appellants: *A. D. Vandamm & Co.*
Solicitors for the respondent: *L. Bingham & Co.*

J. R.

1936
March 16.

COMMISSIONERS OF INLAND REVENUE *v.* LORD HATHERTON (EXECUTORS).

Revenue—Mineral Rights Duty—Rent—"Rental value" of free coal supplied by lessees to lessors—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *ss.* 20, *sub-ss.* 1, 2; 24.

The meaning of "rent" and "rental value" in s. 20 of the Finance (1909–10) Act, 1910, is not confined to its ordinary, common law meaning, but includes every part of the consideration for the granting of a mining lease.

Hence, where in such a lease part of the consideration was the supply to the lessors by the lessees of a specified quantity of the coal to be gotten from the mine, free of charge:—

Held, that mineral rights duty under the above section, which was leviable on the "rental value" of all rights to work the coal, was leviable on the value of this free coal.

Petition by way of appeal under s. 33, sub-s. 4, of the Finance (1909–10) Act, 1910, from the decision of the referee.

Assessments to mineral rights duty and royalties welfare levy for the years 1926–27 to 1934–35 inclusive were made by the Commissioners of Inland Revenue in respect of the value of certain free coal supplied to the respondents, the lessors, the executors of Baron Hatherton, deceased, under the provisions of a lease dated July 24, 1899, made between the said Baron Hatherton and his son (the lessors) and the lessees, the Littleton Collieries, Ld. By that lease the lessors demised to the lessees certain mines for fifty years from

1936

COMMISSIONERS OF INLAND REVENUE *v.* LORD HATHERTON (EXECUTORS).

June 24, 1899, "yielding and paying therefor . . . ." royalties as specified. By clause 19 it was provided "The lessees shall and will each year during the continuance of this demise supply to the lessors or to such other person or persons as they shall appoint any quantity not exceeding altogether in each year one hundred tons and to their agents or to such person or persons as such agents shall appoint any quantity not exceeding in each year fifty tons of the best coal for domestic purposes that shall be raised or gotten out of the said mines and without making any charge for the same."

Another indenture of lease dated June 30, 1924, between the same parties demised other mines, and contained similar provisions.

Under these leases free coal was supplied to the lessors or their nominees or agents or agents' nominees. Assessments on the value of the free coal were made to mineral rights duty under s. 20 of the Finance (1909–10) Act, 1910 (1), and to royalties welfare levy under s. 14 of the Mining Industry Act, 1926. (1)

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(1) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 20: "(1.) There shall be charged, levied, and paid . . . . on the rental value of all rights to work minerals and of all mineral wayleaves, a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value."

"(2.) The rental value shall be taken to be—(*a*) Where the right to work the minerals is the subject of a mining lease, the amount of rent paid by the working lessee in the last working year in respect of that right."

Sect. 24 (the definition section): "The expression 'rent' includes yearly or other rent, and shall, in addition to the meaning assigned to it for the general purposes of this Part of this Act, be construed as including any fine, premium, or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift; Where any rent is paid or rendered otherwise than in money or money's worth, the amount of the rent shall be taken to be such sum as the Commissioners consider to be the value thereof";

"The expression 'mining lease' means a lease for mining purposes, that is, for searching for, winning, working, getting, making merchantable, carrying away, or disposing of, mines and minerals, or purposes connected therewith, and includes an agreement for such lease, or any tenancy or licence, whether by deed, parol, or otherwise for mining purposes, and the expressions 'lessor' and 'lessee' shall in addition to the meaning assigned to them for the general purposes of this Part of this Act be construed so as to include respectively a licensor and a licensee."

The defendants appealed against these assessments to the referee, on the ground that the free coal was not a rent or rental value within the meaning of s. 20 of the Act of 1910. The referee gave his decision in each case as follows: "I decide that the free coal in respect of which the assessment is made is not a rent within the meaning of the statute."

The Commissioners of Inland Revenue petitioned against this decision by way of appeal from the referee.

Sir Donald Somervell S.-G. and *J. H. Stamp* for the petitioners. It may be that the obligation under the lease to supply this free coal is not rent in the strict, common law sense; but the definitions of "rent" and "mining lease" in s. 24 of the Act of 1910 (2) show that something wider than the relation of landlord and tenant is referred to. By that section "lessor" and "lessee" are to include "licensor" and "licensee." What s. 20 of the Act of 1910 (1) aims at as the basis of duty is the consideration, whatever it is, for the licence—which includes a lease: see s. 24 (1)—to mine for coal granted by the lease of July 24, 1899. In this case part of this consideration was the free coal. Considerations other than money payments may be a rent: Coke upon Littleton 142a; corn-rents are not uncommon, and are "yielded or rendered, not paid": per Brett M.R. in *In re Moody and Yates' Contract.* (3) Therefore the assessment on the value of the free coal was valid.

E. G. Hilton Weeks for the respondents. This free coal was not rent, for three reasons. First, rent must be reserved to the lessor; here by clause 19 of the lease it is reserved partly to the lessor and partly to others.

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(1) Mining Industry Act, 1926 (16 & 17 Geo. 5, c. 28), s. 14: "(1.) Every person liable to pay mineral rights duty on the rental value of rights to work coal . . . . shall be liable to pay . . . . a levy (hereinafter referred to as 'the royalties welfare levy') at the rate in each case of one shilling for every twenty shillings of that rental value."

(2) See note (1) ante, p. 317.

(3) (1885) 30 Ch. D. 344, 347.

[Gilbert on Rents (1758), p. 54; Woodfall on Landlord and Tenant (23rd ed.), p. 191, sect. 7; Coke on Littleton 47a (*d*); and 2. Blackstone, p. 299, para. 4, were referred to.]

Secondly, rent must be reserved by apt words. Here rent properly so called was by apt words reserved by a clause in the lease, but with regard to this coal the word " reservation " was not used.

[Woodfall on Landlord and Tenant (23rd ed.), p. 191, sect. 7; Gilbert on Rents, p. 30; Coke on Littleton 47a (*a*); *Anonymous* (Case 131) (1); and *Campell* v. *Leach* (2) were referred to.]

Thirdly, rent cannot be something in esse, part of the thing granted, as was this free coal, for if so, the lessor would be receiving something already his, and would get no profit. It would be a derogation from the grant.

[LAWRENCE J. But this coal in its state when allowed to the lessor was not in esse at the time of the execution of the lease. It had been commercialised.]

[Brooke's Abridgement, Tit. " Reservation," para. 46; Coke upon Littleton 47a (*b*), 142a; Doctor and Student (Christopher St. Germain) (1518, 18th ed., 1815), Dialogue II., ch. xxii., p. 168; *Rex* v. *Pomfret* (*Earl*) (3); *Rex* v. *St. Austell* (*Inhabitants*) (4), per Abbott C.J.; *Cardigan* (*Earl*) v. *Armitage* (5), per Bayley J.; *Fancy* v. *Scott* (6); *Douglas* (*Doe. d.*) v. *Lock* (7), and *Morrice* v. *Antrobus* (8) were referred to.]

Sir Donald Somervell S.-G. in reply. The respondents' argument is based on common law rules as to rent. But in the present case s. 20 of the Act departs from the strict meaning of lessor and lessee, and makes it include a licensor and licensee. Under s. 20 of the Finance (1909–10) Act, 1910, rental value and rent mean the consideration obtained by the lessor for the mining lease. Part of that consideration was this free coal. These mining leases are really " mere licences to win and remove minerals": per Lindley L.J. in *In re Roundwood Colliery Co.* (1)

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(1) (1695) 12 Mod. 73.

(2) (1775) 2 Amb. 740.

(3) (1816) 5 M. & S. 139, 143.

(4) (1822) 5 B. & Ald. 693,698.

(5) (1823) 2 B. & C. 197, 206.

(6) (1828) 2 Man. & Ry. 335, 338.

(7) (1835) 2 A. & E. 705, 743.

(8) (1663) Hardres Rep. 325.

The rent was reserved to the lessor only and not to strangers. All the contractual rights were in the lessor, and he was at liberty to appoint any one to receive the coal on his behalf.

With regard to the argument that apt words must be used, it is a fallacy when applied to a taxing Act. If all that people had to do in order to escape tax was to use words which are not apt, escape would be easy. [*Greville-Nugent* v. *Mackenzie* (2) was referred to.]

This coal was not in esse at the time of the execution of the lease. The lessor got something different—namely, commercialised coal.

Lawrence J. In this case, as I have formed an opinion, I think I may give my judgment now, although the points which have been raised before me are of some complexity.

The question which I have to decide on appeal from a referee under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910, is whether the respondents have rightly been assessed to mineral rights duty and royalties welfare levy in respect of the value of free coal which has to be supplied by the lessees to the respondents or to their agents under clause 19 of a lease of July 24, 1899, and under clause 3 (*d*) of a lease of June 30, 1924. The referee decided that that assessment was wrong, and the question turns upon the construction of s. 20 of the Finance (1909-10) Act, 1910. [His Lordship read it. (3)] The definition section 24 goes on to provide [His Lordship read it (3)].

It was contended by Mr. Weeks on behalf of the respondents in a most interesting argument that the words "rent" and "rental value" in these sections of the Act refer to what is strictly called rent by the old common law, and that the essentials of rent at common law are first that the rent must be reserved to the lessor and not to any stranger. Mr. Weeks contends that in the case of these leases the free coal is reserved not to the lessors but is reserved to their agents or nominees; secondly he says that it is essential that rent must be reserved by apt words, and as the leases here have reserved rents by other clauses and do not use the word "reservation" with reference to this free coal, that there are no apt words in these leases describing this free coal as rent; and thirdly that rent cannot be a reservation of something in esse which forms part of the land granted. On the other hand, it is contended on behalf of the Crown that the word "rent" in the statute is not used in the narrow sense of the common law and that it is used in a wider sense, and includes every part of the consideration for the granting of a lease, and that the stress is laid upon the second paragraph of the definition of rent and upon the definition of the expression "mining lease," which shows, so it is argued, that the statute is not dealing with leases in the true sense or with rent in a strict sense, but is dealing with any and every right to work minerals and with the consideration therefor. Mr. Weeks on behalf of the respondents drew my attention in support of his propositions to a number of authorities, which I do not think it is necessary for me to recite, which seem to support the contention that rent, according to the old authorities, had the three essentials for which he contends. The Solicitor-General answered these authorities in the first place by contending, as I have already said, that the word "rent" is not used in its strict sense, and in the next place by pointing out that in this case the supply of free coal was reserved in reality to the lessor, because it had to be supplied to his agents or nominees, and that the only right which the lease conferred was a right conferred upon the lessor himself, and he contended that the essential to which Mr. Weeks is referring on the old authorities was an essential that the lease should not reserve any right to a stranger, and he said that this lease does reserve no right to a stranger; so that even if he was not right in his main contention, that would answer the first point. As to the second point, he contended that if apt words have to be used, then it would be open to every taxpayer to avoid the effect of this tax by using words which were not apt to describe rent. Lastly, on the third point, he contended that the getting or the supply of free coal was not a matter of exception but was a real matter of reservation of something which was not part of the land granted but was coupled with the service of bringing the coal to the surface. He drew my attention to three authorities, in the first of which, *Campbell* v. *Leach* (1), it was held that a power given, as I understood it, to trustees to get the best rent authorized them to get one which included the supply of ore. My attention was also drawn to the case of *In re Moody and Yates' Contract* (2), in which Brett M.R. treats the word "rent" as including a supply of minerals where he says (3): " But I must go further and say whenever a rent in kind is reserved,—such as the delivery to the landlord in an agricultural lease of a portion of the crops of hay, or in a mining lease of a part of the coals or minerals won from the soil—although it is a real rent, it does not fall within the statute, which applies only where there is a payment in money. In other cases, such as those which I have mentioned, rent is yielded or rendered, not paid." Fry L.J. used words of a similar import, and what the Master of the Rolls and Fry L.J. were there saying was that such a provision under a mining lease would be providing for the rendering of a real rent. The third authority referred to was the case of *Greville-Nugent* v. *Mackenzie* (4), where Lord Halsbury points out (5) that "rent" is a somewhat inappropriate word to use for the payment made in consideration of getting of minerals, and he says: " Now, whatever might have been the case originally, and I am not prepared to defend the logic of some of the reasons given in the earlier decisions, at all events for obvious reasons—and I think if the Courts had the power by law to do it they were most useful and cogent reasons—they have treated in this class of case the produce of the soil as including that which is in truth what Lord Cairns has described as the substance of the soil itself. In speaking of coal, for instance, we talk constantly about the ' rent ' and ' royalty ' of coal. The phrases are figurative: you pay rent in one sense it is

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(1) [1897] 1 Ch. 373, 391.

(2) [1900] A. C. 83, 87.

(3) See note (1) ante, p. 317.

(1) 2 Amb. 740.

(2) 30 Ch. D. 344.

(3) Ibid. 346.

(4) [1900] A. C. 83.

(5) Ibid. 87.

true; but rent generally has been understood to be a return from the soil, and not to be a consumption or taking away of the soil; whereas of course where the soil consists of coal and other minerals you are actually taking it away. But whatever may have been the original view of such questions, the matter has now become so perfectly well ascertained by a long course of decisions that wherever those general words are used and the question is whether the tenant for life is entitled to what, in one sense, is called the usufruct, but I suppose in more strict language would be called part of the soil itself—where you are dealing with minerals it has always been held, so far as I know, without doubt or question, for centuries that the proceeds of opened mines form part of that which may go to the tenant for life, and that he is entitled to take them as part of the proceeds of the soil."

In view of these decisions and in view of the language of s. 20 and the definition section, s. 24 of the Act of 1910, I am of the opinion that the assessment in respect of this supply of free coal was a proper assessment. It seems to me, from the words of s. 20, which imposed a duty upon the value of all rights to work minerals, that "all rights" contemplate not only what are strictly leases, the consideration for which may in strictness be said to be rent, but apart from the definition section would be read as including other forms of tenure which do not fall within the description "leases," but include every form of right to win minerals. That view is emphasized and confirmed by the definition section 24, which in terms defines a mining lease as applying to a licence to get minerals. It appears to me, therefore, that the rent and the rental value with which the statute is dealing is not to be confined to what is rent or rental value within the meaning of the old common law, but that it includes the consideration, whatever the consideration may be, for the granting of the right to win the minerals. In the present case it is clear, in my judgment, that a part of the consideration for the right to win these minerals was the supply of free coal under clause 19 of the first lease and under clause 3 (*d*) of the second lease. I therefore hold that the appeal must be allowed.

1936

COMMISSIONERS OF INLAND REVENUE *v.* LORD HATHERTON (EXECUTORS).

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Gibson & Weldon, for Hand, Morgan & Co., Stafford.*

W. L. L. B.

C. A.

1936

May 6.

MORGAN *v.* CULLEN.

County court—Jurisdiction—Power of judge to refer action to registrar for inquiry and report—Consent of parties—Absence of consent—County Courts Act, 1919 (9 & 10 *Geo.* 5, *c.* 73), *s.* 6—*County Courts (Amendment) Act,* 1934 (24 & 25 *Geo.* 5, *c.* 17), *s.* 20.

Apart from the special cases referred to in the County Courts (Amendment) Act, 1934, s. 20, a county court judge has no power to make an order referring the whole of an action to the registrar for inquiry and report, unless the parties consent thereto. Such an order if made without consent renders the proceedings void ab initio and is not cured by the subsequent conduct of the parties.

APPEAL from Lambeth County Court.

The appellant was the plaintiff in two actions brought in Lambeth County Court against the defendants Mr. and Mrs. Cullen, the first action being for recovery of possession of premises at 7, Crampton Street, Newington Butts, S.E., and for arrears of rent and mesne profits, and the second being for 49*l.* 10*s.*, the price of milk sold and delivered to them.

The two actions, though not consolidated, were placed together in the list, and referred by the learned county court judge to the registrar for inquiry and report. Both actions arose out of an alleged contract between the parties relating to a milk business carried on at 7, Crampton Street aforesaid. The alleged contract was an oral agreement that the defendants should act as managers of the business for the plaintiff and should reside upon the premises, paying rent to the plaintiff; and that they should also pay 1*l.* a week to the plaintiff as his share in the profits, the balance of which they were to retain. The defendants were to purchase all milk from the

C. A.
1936

MORGAN
v.
CULLEN.

plaintiff, as he alleged, at the current retail price, less 2*d.* per gallon.

The registrar held an inquiry, which lasted four days, and made his report. No objection to the reference was raised at the time by the parties. After considering this report the county court judge found that there was no agreement and gave judgment for the defendants with costs. The plaintiff appealed on the ground that the learned judge was wrong in law, in finding in the first action that there was no contract and in the second action that there was no agreement by the defendants to pay for the goods sold and delivered to them. The main point argued at the hearing of the appeal was whether the learned judge had power to refer the whole action to the registrar without consent of the parties.

H. V. Lloyd-Jones for the appellant. The County Courts (Amendment) Act, 1934, s. 20, which amends the County Courts Act, 1919, s. 6 (1), defines the cases in which the judge may refer the action to the registrar for inquiry and report, without obtaining the consent of the parties. Those powers do not cover the reference in the present case, and the learned judge was exceeding his jurisdiction. The proceedings before the registrar are therefore a nullity, and the case should be remitted. The appellant never consented to the reference, he merely obeyed the order by appearing before the registrar.

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(1) The County Courts Act, 1919, s. 6, provides as follows: "Subject to county court rules, the judge may in any case, with the consent of the parties, refer any action or matter or any question arising therein to the registrar or a referee for inquiry and report."

The County Courts (Amendment) Act, 1934, (c. 17) s. 20, provides: "Notwithstanding anything in section six of the County Courts Act, 1919, the judge shall have power, whether with or without the consent of the parties, to refer in accordance with the provisions of that section:—

"(*a*) any action or matter which requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the judge, conveniently be made before him;

"(*b*) any action or matter where the question in dispute consists wholly or in part of matters of account;

"(*c*) subject to any right to have particular cases tried with a jury, any question arising in any action or matter."

[These sections are in substance re-enacted in the County Courts Act, 1934, (c. 53) s. 90, which is not yet in force.]

B. M. Cloutman (*Henry Westlake* with him) for the respondents. The proceedings before the registrar were valid, and the judgment should stand. At the most what was done was only irregular, and not a nullity. In *Fry* v. *Moore* (1) Lindley L.J. pointed out the distinction. Where there is only an irregularity it can be waived by the parties, and here it was cured when the appellant appeared at the hearing before the registrar, and made no protest. The consent was ex post facto, bringing the matter within the ambit of the County Courts Act, 1919, s. 6.

SIR BOYD MERRIMAN (THE PRESIDENT). This appeal raises a question of some public importance. It is first necessary to state what were the issues in the case and how they have been dealt with so far. Two actions were started on different dates between the same parties, but eventually after abortive attempts at a settlement they came on for trial together. One was a claim for possession and mesne profits with an alternative claim for a sum for use and occupation, and the other was a claim for goods sold and delivered. The substance of the matter was that the defendants, or one of them, had intended to enter into an agreement with the plaintiff, the details of which are in dispute, for the occupation of certain premises, incidental to an arrangement between them connected with a milk business. In fact—and this is common ground between the parties—the parties were never ad idem as to the agreement under which possession of the premises was taken. After two attempts to bring the parties together the county court judge referred the matter to the registrar for inquiry and report. I shall refer later to the statutory power of the judge to make such an order, but I must first say that when the matter came before the registrar counsel for the defendants presented to him an indorsement of the judge's order in this form: "No consensus ad idem. Refer to registrar for inquiry and report on footing that there was no agreement." Counsel for the plaintiff, who submitted that he had not consented to the order, pointed

(1) (1889) 23 Q. B. D. 395, 398.

out that that was not his view of the judge's order, and said that the judge had not limited the reference in this way and that he had made no finding as to the question whether there was a contract. The registrar then made inquiries from the judge as to his order, and afterwards informed the parties that the whole action had been referred for inquiry and report. In my view it is imperative, when a county court judge delegates powers of trial to the registrar, that the exact scope of the reference should be defined in an order regularly drawn up so that the parties may know precisely where they stand. Indeed Order 20A, r. 1 (1) (i), of the County Court Rules, 1903–1934, directs that the order for inquiry and report shall be in a particular form. At this stage, as has been pointed out to us by counsel for the defendants, the plaintiff could have appealed; but it is clear that in such circumstances the parties have a difficulty in defining their position unless an order of this character is drawn up in precise terms.

It is important to look at the statutory provisions under which the county court judge purported to make the order referring the whole action for inquiry and report without the consent of the parties. The County Courts Act, 1934, which is a consolidating Act, is not yet in force, and one must therefore turn to the County Courts Act, 1919, s. 6, and to the County Courts (Amendment) Act, 1934, s. 20. Sect. 6 says: "Subject to County Court rules, the judge may in any case, with the consent of the parties, refer any action or matter or any question arising therein to the registrar or a referee for inquiry and report." The material words are "the judge may with the consent of the parties refer any action to the registrar." By s. 20 of the Act of 1934, notwithstanding anything in the County Courts Act, 1919, s. 6, the judge shall have power, whether with or without the consent of the parties, to refer in accordance with the provisions of that section—

(*a*) any action or matter which requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the judge, conveniently be made before him;

(*b*) any action or matter where the question in dispute consists wholly or in part of matters of account;

(*c*) subject to any right to have particular cases tried with a jury, any question arising in any action or matter.

In this case it is agreed that there was no mere reference of a question in an action but of the action itself. It follows from reading the two sections together that although there is power to refer whole actions of two specified classes, this action was not one of either class, and that, apart from that, there is no power to refer the whole action for inquiry and report without the consent of the parties; and it is conceded that there was no consent to the order in this case. The question therefore is, as Lindley L.J. said in *Fry* v. *Moore* (1), " whether the order . . . . was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity." He there said that he would not attempt to draw the exact line between an irregularity and a nullity, but that in general one could easily see on which side of the line the particular case fell. I have no difficulty in seeing on which side this case falls. Though counsel for the respondents very properly did not press the argument, he suggested that it could be dealt with as an irregularity, because what was done could have been done by consent of the parties and therefore subsequent conduct could be held to have waived the irregularity. I think this is not sound, because the parties themselves are the best judges whether in the circumstances of the case it would be useful and proper to refer the action for inquiry and report, leaving the ultimate decision to the judge. If they agree to do so they cannot complain if an order is made to that effect. The section was designed to relieve pressure in the county court and to enable the parties to have the action decided by the registrar subject to the judge's giving the final judgment, without being obliged as under the old statute to treat the registrar as a consensual referee with all the consequences of that procedure. But although the Legislature has made that provision where the parties consent, it plainly had no intention of enabling, but rather intended to prohibit, any such course being taken against the will of the parties, except in the special cases provided for in the County Courts (Amendment) Act, 1934, s. 20. It is vital that this distinction should be kept in mind. If a county court judge could, without consent, refer any action to the registrar for inquiry and report he would in effect be directing another person to hear and observe the witnesses and to report to him as to the impression made by them, and then himself be drawing the conclusions of fact which depend upon a correct decision as to the weight of the evidence. This proposition has only to be stated to be rejected as absurd, and yet that is substantially what has been done here. This case shows how necessary it is to observe the statutory limits of the jurisdiction to refer. After four days hearing before the registrar a report is produced which, careful and elaborate as it is, bears little reference to the actual dispute. This case must go back to the county court judge with the direction that he shall himself hear and determine the issues in this matter as now limited by the agreement of the parties that one issue no longer exists—namely, whether the parties were ad idem. It must go back without comment from us as to the reality of the remaining issues, and with leave to the parties to amend the pleadings, if necessary, so as to bring before the judge such matters as still remain in issue. The appeal must be allowed and the matter remitted.

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(1) (1889) 23 Q. B. D. 395, 398.

SCOTT L.J. This is a case of general importance. The learned county court judge referred the whole of two actions to the registrar for inquiry and report without the consent of the parties under the County Courts Act, 1919, s. 6. I agree that under the County Courts (Amendment) Act, 1934, s. 20, he had no jurisdiction to refer the whole action in this way. The result is that everything that has been done is a nullity, including the hearing before the judge. It ought to be heard by the judge de novo, and the previous proceedings should not be referred to, because the evidence in those proceedings

C. A.
1936

MORGAN
v.
CULLEN.

has not been given coram judice. The responsibility for a judicial decision should be discharged by the judge himself except in the special circumstances which are laid down by statute as authorizing the delegation of his duty.

EVE J. I agree. This appeal involves the question whether the two orders made on March 31, 1936, can stand, or whether they were made without jurisdiction. In my view they should be set aside and the appeal allowed. The parties should have an opportunity of defining their attitude and for that purpose amendments will have to be made in the pleadings and particulars, but these should not extend beyond matters which have become important since the pleadings were originally filed.

Appeal allowed. Case remitted.

Solicitors for appellant: *T. D. Jones & Co.*
Solicitors for respondents: *E. A. Mathew.*

F. P. F.

C. A.
1936
Mar. 26, 27; April 7.

KNOWLES *v.* SOUTHERN RAILWAY COMPANY.

Workmen's compensation—Accident—Whether happening in the course of workman's employment—Whether act done for purpose of employers' business—Rule prohibiting consumption of intoxicating liquor on duty—Workman leaves van for prohibited purpose—Accident in remounting van—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-ss.* 1, 2.

A railway company had a rule that "Employees must not consume intoxicating liquor while on duty." The rule, which was in a book of rules, was well known to the employees of the company including the deceased man, a carter, whose duty it was to drive a pair-horse van. On the evening of the day when the accident occurred he was taking a load from the railway company's depot at Tooley Street to their depot at Nine Elms. While on his way he stopped his van outside a public-house in the Borough, descended from the box seat, put a chain on the near side wheel and removed the near side trace. He then left his horses and van and went some distance up a side street to a public-house for the purpose of getting a glass of beer and also of using the lavatory, but the county court judge found as a fact that the dominant purpose of the deceased man in going to the public house was to drink the glass of beer. When he went back to his van, he removed the chain from the wheel, replaced the trace and took the reins in his hands, and was in the act of mounting to his seat when, probably owing to the horses starting to move, he slipped and fell under the wheel of the van and sustained injuries which caused his death. On a claim by his widow for compensation under the Workmen's Compensation Act the county court judge held that the deceased man had been guilty of a breach of one of the company's rules, but that the rule merely regulated the man's conduct in his employment and did not limit the scope of his employment; that at the moment of the accident when the deceased man was in the act of mounting to his box seat he had fully returned to his employment, and that in mounting the box seat the deceased man was doing something for the purposes of his employers' trade or business, and that therefore the applicant was entitled to compensation. On an appeal by the railway company:—

Held, that the accident did not arise in the course of the deceased man's employment, for it was no part of the man's employment to do an act which he had been forbidden to do by a genuine and express prohibition. Further, the act which caused the accident was not done for the purpose of the employers' business, because the act of mounting the box seat, though ordinarily incident to the deceased man's employment, was done on this occasion not for the employers' purposes, but to enable the workman to resume his wrongfully interrupted employment, and to get back into the place where he could again perform his duty. The applicant therefore could not avail herself of sub-s. 2 of s. 1 of the Workmen's Compensation Act, 1925.

APPEAL against an award of the judge of the Southwark county court in favour of the widow, one of the dependants, of George Knowles, who died as a result of an accident on June 12, 1934.

Knowles was employed by the Southern Railway as a van driver. On the day of the accident he started his work as usual at 8.15 A.M. At 5.45 P.M. his normal working hours came to an end, but he was sent out again, shortly before 6 P.M., from the railway company's Tooley Street depot with a load which he should have taken to their depot at Nine Elms, arriving shortly after 7 P.M. While on his way from Tooley Street to Nine Elms the deceased stopped his van outside a public-house called "The Fountain" in the Borough.

He descended from the box seat, having first drawn into the near side kerb outside "The Fountain," put a chain on the near side hind wheel, removed the near side trace and threw it over the back of the near side horse, and put the reins through a brass ring on the harness. He left the van boy in charge. Knowles then crossed the street to a public-house called "The Gladstone Arms," which was in a side turning almost opposite "The Fountain" where the van had stopped. At that public-house, which Knowles reached at 6.15 P.M., he walked straight through to the lavatory, ordering a pint of beer as he passed through the bar. He came out of the lavatory, drank his beer quickly and left the public-house and went straight back to his van; he was absent altogether between five and ten minutes.

There was no actual eye-witness of the accident, but the county court judge came to the conclusion on the van boy's evidence that Knowles, having removed the chain from the wheel and replaced the trace and taken the reins in his hands, was in the act of mounting to the box seat when, probably owing to the fact that his horses started to move on at the moment, he slipped and fell under the wheel of the van, whereby he sustained injuries which caused his death. The van was a pair-horse van of the usual pattern, the box seat being some considerable distance from the ground.

The deceased man's widow claimed compensation under the Workmen's Compensation Act, 1925. (1)

(1) The relevant sections of the Workmen's Compensation Act, 1925, are as follows:—

Sect. 1, sub-s. 1: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained: Provided that— . . . .

(*b*) If it is proved that the injury to the workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

Sub-s. 2: "For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the

The county court judge found that the deceased man had been guilty of a breach of one of the company's rules, of which he had notice, which provided that "Employees must not consume intoxicating liquor while on duty," but he held that the rule merely regulated the man's conduct in his employment and did not limit the scope of his employment. He found that the deceased man left the van for two purposes, the dominant one being to drink the glass of beer and the other to use the lavatory. He held that at the moment of the accident when Knowles was mounting the box he had fully returned to his employment and that in mounting the box he was doing something for the purpose of his employers' trade or business. The county court judge therefore found for the applicant.

The Southern Railway Company appealed.

F. W. Beney for the appellants. The deceased man in dismounting from the box seat of his van for the dominant purpose, as the county court judge found, of consuming a glass of beer in breach of one of the company's rules, was departing from the course of his employment, and for the time being he suspended the course of his employment, and he only resumed his employment when he reached the box seat of his van again. It was the primary duty of the man to obey the rule not to consume intoxicating drink while on duty. He deliberately pulled up his van with the intention of breaking the rule, and he temporarily suspended his employment as soon as he commenced to dismount from his box seat, and he did not resume his employment till he got back to his box seat. My argument is conveniently stated in Willis's Workmen's Compensation, 30th ed., p. 35, thus: "A sailor who leaves his ship and goes ashore without permission temporarily suspends his employment, and it would

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accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

C. A.
1936

Knowles
v.
Southern
Ry. Co.

appear that from the moment he sets his foot on the gangway leading to the quay with the intention of absenting himself without leave until he is actually back on the ship again, in other words until he has reinstated himself in that position which he ought not to have left, nothing that occurs to him can impose a liability on his employer to compensate him under the Act." See *Everitt* v. *Eastaff & Co.* (1), which would have been directly in point if the deceased man had pulled up outside " The Gladstone Arms " where he had his drink, and *Warren* v. *Hedley's Colliery.* (2) The county court judge misdirected himself in holding that the deceased man had resumed his employment at the time of the accident. In *Davies* v. *Gwauncaegurwen Colliery* (3) a workman, contrary to express orders, went into a prohibited area to hang up his coat and in returning to his proper working place fell into a hole and was fatally injured. Atkin L.J. said (4) : " In the present case the workman was expressly prohibited from going to the disused part ; it was a complete prohibition ; he had no business to go there, it was completely railed off, and he could only go there by getting over or under the rail ; and what he was doing there he was doing for his own purposes. The fact that he had completed his own particular purpose of hanging up his coat and was returning to his screen is just as irrelevant as the fact that in *Brice* v. *Edward Lloyd, Ld.* (5) the man had finished eating his meal and was getting off the tank. He was going out of the prohibited area and going back to a place to commence his work. It is idle to say, that while doing that and returning from a prohibited area, he was getting into the proper place of his employment for the purposes of his master's trade or business." *Martin* v. *Lovibond & Sons* (6) is distinguishable as there the drayman's employment kept him about the streets without any regular intervals for meals, and it was held to be incidental to his employment that he should leave his dray during the course of the day for the purpose of obtaining reasonable refreshment. The dictum of Romer L.J. in *Taylor* v. *Lock* (1) "assuming that, having temporarily left his employment, it was his duty to his employer to re-enter the employment as soon as possible, and, in my opinion, when he was—on the assumption that I have made—getting up on the step to get into the steam engine again he had re-entered his employer's employment" is against the present contention; but in that case there was no prohibition as in the present case. The prohibition in the present case was one which limited the sphere of the deceased man's employment and was not merely one which dealt with his conduct within the sphere of his employment. Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (2) pointed out that a transgression of a prohibition which only dealt with conduct within the sphere of employment left the sphere of employment where it was, and consequently would not prevent the recovery of compensation, whereas a transgression of a prohibition which limited the sphere of employment carried with it the result that the man had gone outside the sphere of employment. Warrington L.J. pointed out in *Davies* v. *Gwauncaegurwen Colliery* (3) that the effect of the words in s. 1, sub-s. 2, of the Act of 1925 "if such act was done by the workman for the purposes of and in connection with his employer's trade or business" was to limit the prima facie effect of the section, and to indicate an intention to prevent it applying to acts merely incidental to the employment, and to confine its operation to acts done by the workman "for the purposes of and in connection with the employer's trade or business." In the present case the man in mounting to his box seat was doing so because he had been doing a prohibited act and therefore the act was merely incidental to his employment. Sargant L.J. pointed out in *Borley* v. *Ockenden* (4) that it must be shown that the act causing the injury was done by the workman

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(1) (1913) 6 B. W. C. C. 184.

(2) (1913) 6 B. W. C. C. 136.

(3) [1924] 2 K. B. 651 ; 17 B. W. C. C. 181.

(4) [1924] 2 K. B. 665 ; 17 B. W. C. C. 197.

(5) [1909] 2 K. B. 804 ; 2 B. W. C. C. 26.

(6) [1914] 2 K. B. 227 ; 7 B. W. C. C. 243.

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(1) (1930) 23 B. W. C. C. 55, 63.

(2) [1914] A. C. 62, 67; 7 B. W. C. C. 1, 6.

(3) [1924] 2 K. B. 651, 660; 17 B. W. C. C. 191.

(4) [1925] 2 K. B. 325, 338; 18 B. W. C. C. 55, 67.

C. A.
1936

Knowles
v.
Southern
Ry. Co.

with the main object of furthering his employer's business. In the present case the prohibition put the consuming of intoxicating liquors outside the man's employment altogether, it did not merely regulate the manner of doing his work, but prohibited the doing of certain acts altogether, and therefore sub-s. 2 of s. 1 does not apply. In *Herbert* v. *Samuel Fox & Co.* (1) it was held that the workman was not entitled to compensation as he had by his conduct exposed himself to a risk which, by express prohibition, was placed outside the sphere of his employment. In *Thomas* v. *Ocean Coal Co.* (2) it was held by the House of Lords that the accident causing the injury was to be deemed to have arisen out of and in the course of the deceased man's employment, notwithstanding that he was at the time of the accident acting in contravention of a statutory regulation applicable to his employment, because the act was done for the purposes of and in connection with the employer's trade or business. It was however said in *Privett* v. *Darracq Motor Engineering Co.* (3) that *Thomas* v. *Ocean Coal Co.* (2) had not made any alteration in the law. In mounting the box seat the deceased man was not doing an act within the scope of his employment or doing an act for the purposes of his employer's trade or business.

W. Shakespeare for the respondent. The county court judge was right in holding that the rule which prohibited the consumption of intoxicating liquor while on duty was one which merely regulated the conduct of the workman in the course of his employment, and did not limit the scope of his employment. In *Estler Brothers* v. *Phillips* (4) a workman was employed on a machine which it was part of his duty to clean. There was a notice prohibiting the cleaning of the machine while it was in motion. The workman, who had seen the notice, nevertheless cleaned the machine while it was in motion and was entangled in the machinery and severely injured. The county court judge found that the

(1) [1916] 1 A. C. 405; 9 B. W. C. C. 164.

(2) [1933] A. C. 100; 25 B. W. C. C. 436.

(3) (1934) 151 L. T. 211; 27 B. W. C. C. 163.

(4) (1922) 127 L. T. 73; 15 B. W. C. C. 291.

workman was, notwithstanding his disobedience, acting within the scope of his employment, and the House of Lords held that there was evidence upon which he could so hold. In *Stoker* v. *Wortham* (1) it was held that the question whether the employment was or was not of a casual nature was a question of fact. In considering whether a workman has committed a breach of a rule the construction of the rule comes into question. In the present case no question was raised in the county court with regard to the meaning of the rule. Its meaning was accepted, and therefore the question to be decided was a pure question of fact, and there is therefore no appeal from the decision of the county court judge. In any event, the rule merely regulated the conduct of the man in his employment and did not limit the scope of his employment. The deceased man had at the time of the accident got back to the sphere of his employment notwithstanding his breach of the rule and therefore his dependant is entitled to compensation. In *Read* v. *Pacific Steam Navigation Co.* (2) the workman went to his work by an improper route, but at the time of the accident he had arrived at a point at which he would have had to arrive had he gone by the proper route, and was, in fact, doing what it was his duty to do, and it was held that it was immaterial that in getting to his work he went by an improper route. It is sufficient if a workman who has left his work has at the time of the accident returned to the ambit of his employment. A carter's ambit of employment is not limited to the box seat; he must as part of his employment attend to his horses. It would therefore be putting too narrow a construction upon the duty of the deceased man to say that he had not returned to the sphere of his employment until he had got back to his box seat. His employment did not cease merely because he left his box seat for a reason which was prohibited by the rule. The term " ambit of his employment " was used in *Warren* v. *Hedley's Colliery Co.* (3) In that case Cozens-Hardy M.R.

(1) [1919] 1 K. B. 499; 12 B. W. C. C. 34.

(2) (1922) 15 B. W. C. C. 39.

(3) (1913) 6 B. W. C. C. 136, 140.

said (1): "If the workman goes where it was not his duty to go and practically gets back and resumes his work before the accident happens, the fact that he went away does not in any way disentitle him to the protection of the Act." In *Taylor* v. *Lock* (*No.* 1) (2) a driver of a steam lorry had left it partly for his own purposes and was killed while trying to board the lorry while in motion. Romer L.J. in that case said (3) that in his opinion "when he [the driver] was . . . . getting up on the step to get into the steam engine again he had re-entered his employer's employment." It is therefore enough if a workman has returned to the ambit of his employment even though he has not returned to the place which he left. The mere fact that the accident happened at a spot where the workman ought not to be while endeavouring to return to the place where he ought to be does not prevent the accident taking place in the course of his employment. In *Garrallan Coal Co.* v. *Anderson* or *Devlin* (4) a pit bottomer, whose duty it was to put loaded trucks into, and to take empty trucks from, the cage, contrary to the statutory regulation, crossed the pit bottom and was killed. The arbitrator found that he had gone outside the scope of his employment and that there was no evidence that in so doing he was acting for the purposes of or in connection with his employer's trade or business and therefore awarded in favour of the employers. This finding was upheld by the House of Lords. In *Thomas* v. *Ocean Coal Co.* (5) the facts were almost identical except that the arbitrator found that the act was done for the purposes of and in connection with the employer's trade or business, and it was held by the House of Lords that the accident causing the injury must by virtue of s. 1, sub-s. 2, of the Act of 1925, be deemed to have arisen out of and in the course of the deceased man's employment, notwithstanding that he was at the time of the accident acting in contravention of a statutory regulation.

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(1) (1913) 6 B. W. C. C. 138.
(2) (1930) 23 B. W. C. C. 55.
(3) 23 B. W. C. C. 63.
(4) [1927] A. C. 59; 19 B. W. C. C. 356.
(5) [1933] A. C. 100; 25 B. W. C. C. 436.

[SLESSER L.J. In *Warren* v. *Hedley's Colliery Co.* Cozens-Hardy M.R. said (1): "If a man for his own purposes deliberately goes away from the place where he was employed, and meets with an accident on the way back before he reaches the place where he should be to do his duty, the judge is justified in finding, prima facie, that the accident did not arise in the course of his employment."]

It is sufficient if the workman has—to use an earlier expression of Cozens-Hardy M.R. in the same case—practically got back to his work; it was not necessary that the deceased man in the present case should have actually mounted to his box seat. Whether a workman is attempting to return to his employment is quite a different question from the question whether what the man was doing at the time of the accident was being done for the purposes of and in connection with his employer's trade or business. If the rule merely regulates the workman's conduct within the sphere of his employment a breach of it does not make the man's act something done outside his employment. It was laid down in *Thomas* v. *Ocean Coal Co.* (2) that "the true view of the" Workmen's Compensation Act, 1925, "was that it must first be ascertained if, disregarding the prohibition, the injury was due to an accident arising out of and in the course of the employment, and then the effect of the prohibition in removing the accident from that category might be annulled if the later condition as to the act being for the purposes of the employer's business were fulfilled." In the present case the first point—namely, whether, "disregarding the prohibition, the injury was due to an accident arising out of and in the course of the employment" has been decided in favour of the applicant. She is therefore entitled to the benefit of sub-s. 2 of s. 1 provided that she can show that the act of the deceased man in mounting the box seat was done by him for the purposes of and in connection with his employer's trade or business, and the House of Lords in *Garrallan Coal Co.* v. *Anderson* or *Devlin* (3) and *Thomas* v. *Ocean Coal*

(1) 6 B. W. C. C. 140. (2) [1933] A. C. 100, 107; 25 B. W. C. C. 444.
(3) [1927] A. C. 59; 19 B. W. C. C. 356.

Co. (1) have held that that is a question of fact, which the county court judge has decided in the present case in favour of the applicant The fact that the deceased man would not have been attempting to mount to the box seat but for his breach of the prohibition is immaterial.

F. W. Beney replied.

Cur. adv. vult.

April 7. The following judgments were read :—

SLESSER L.J. This is an appeal by the Southern Railway against an award in favour of Alice L. Knowles, widow and one of the dependants of George Knowles, who died as a result of an accident on June 12, 1934. Knowles was employed by the Southern Railway as a van driver, and the material facts of the case, as found by the learned county court judge, are as follows : [His Lordship then stated the facts set out above.]

A number of the company's rules was tendered in the course of the case to support the appellants' argument that in leaving his van and visiting a public-house in order to get a drink the deceased had broken one of the Company's rules, and the learned county court judge has found, of the several rules relied upon, the deceased was guilty of a breach of one of them—namely, a rule in a book issued in 1932, of which the deceased had notice, to this effect : " Employees must not consume intoxicating liquor while on duty." (Rule 3, sub-r. 5.) It is contended by the employers that, by reason of the breach of this rule, the respondent here cannot say that this accident arose in the course of his employment ; and the first question to be considered is whether, in leaving his van as he did, the deceased was or was not acting in breach of the prohibition contained in the rule referred to. As I read the learned county court judge's judgment and the evidence, the deceased left the van for two purposes : the one, which the learned county court judge has assumed to be the dominant one, to drink a glass of beer, the other to use the lavatory. Had it not been for these two purposes there is no reason to suppose that the deceased would have dismounted from the van when he did. On the finding of the learned county court judge, had there been no accident to defeat his intentions, all the acts done by the deceased from the time when he left the box seat on the van until he resumed his seat there, would have been occasioned solely by and for the purposes of consuming the forbidden drink and using the lavatory, though at other times admittedly he might have left his box seat for many other reasons. Of the two motives which induced the deceased to leave his seat, the learned county court judge has found, as I have said, that his dominant purpose was the drinking of the beer. He could have performed his natural functions, presumably, at " The Fountain " or some public convenience, and I think it would be unreal to excuse his breach of rule merely on the ground that associated with the forbidden act was a legitimate purpose.

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(1) [1933] A. C. 100 ; 25 B. W. C. C. 436.

The learned judge has come to the conclusion that when he was mounting the box the deceased had fully returned to his employment, and therefore finds for the dependant. This decision, for reasons which I state hereafter, I cannot accept, and I find it necessary, therefore, to consider the case upon a different assumption. I start from the position that this man, at the time when he met with his death, in resuming his seat on the box, was about to complete, but had not completed, a course of activities all associated with the forbidden act of consuming liquor while on duty, and from the time of his descent from the van he must be taken to have been engaged on a prohibited adventure. The learned judge has come to a conclusion that, apart from the prohibition, the deceased was acting reasonably in going to the public-house to drink the beer, so that that act, though not one which was a part of his employment, disregarding the rule, might yet have been regarded as so incidental to it that it could be taken to be within the sphere of his employment. But the learned judge also asked himself whether the prohibiting rule regulated the man's conduct in his employment or limited its scope. He was of opinion that

C. A.
1936

Knowles
v.
Southern
Ry. Co.

Slesser L.J.

the rule was merely regulative and, had the breach of the rule in this case occurred while the man was actually engaged in performing his duties, such a finding might well have given the workman a right to compensation, apart altogether from s. 1, sub-s. 2, of the 1925 Act, for the mere fact that an act causing injury is done contrary to a rule which does not limit the sphere of his employment, but only deals with conduct within that sphere, will not prevent the workman being able to say that the accident arose in the course of the employment. (*Plumb* v. *Cobden Flour Mills Co.* (1) and *Barnes* v. *Nunnery Colliery Co.* (2))

But in truth such a finding here, if not irrelevant, cannot be decisive of the present case; for though, had the workman been injured while drinking liquor when engaged in driving the van, the finding of the learned judge that the prohibition was merely controlling his work while he was doing his duty, might have been decisive in favour of the workman; on the issue, of course, of employment, the act here done, even without a prohibition, was not a part of the man's duty, but, at highest, an act reasonably incidental to his employment, and the prohibition of that particular act excludes it from being a thing contemplated by either party. It is no part of a man's employment to do an act which he has been forbidden to do by a genuine and express prohibition; it is not reasonably incidental to his employment: *A. G. Moore & Co.* v. *Donnelly*. (3) "I cannot think that a man is within the protection of the Act when making an excursion solely for his own pleasure." Per Cozens-Hardy M.R. in *Everitt* v. *Eastaff & Co.* (4)—a fortiori a forbidden excursion. To exclude a permission otherwise to be inferred it is enough that a man should be expressly prohibited from doing it to prevent the inferred permission arising; though where there is a direct duty to do an act operating the position may be otherwise, for there the duty to do the act has to be contrasted with the prohibition, which, on the facts, may be more than a rule regulating the manner in which he has to do his duty. In a sense, the finding of the county court judge that Knowles would have been acting reasonably apart from the rule, suggests that the judge himself has found as a fact that the rule at any rate limited the position to this extent, that the incidental right to leave the van did not arise if its purpose was in order that the driver might consume alcohol.

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(1) [1914] A. C. 62; 7 B. W. C. C. 1.

(2) [1912] A. C. 44; 5 B. W. C. C. 195.

(3) [1921] 1 A. C. 329; 13 B. W. C. C. 458.

(4) 6 B. W. C. C. 184, 187.

For these reasons, as I have said, the finding that the rule would be regulative, if the man were in his employment as when he was driving, cannot help the respondent in the present case. This is what I had in mind when, in the course of the argument, I suggested to Mr. Shakespeare that this rule might well operate to be regulative while the man was driving and operate to exclude him from the sphere of his employment when he was doing an act not his duty, but only reasonably incidental to the performance of it.

In these circumstances it becomes necessary for the respondent to invoke s. 1, sub-s. 2, of the Act, in order to say that the prohibited act shall be deemed to be done in the course of the employment, notwithstanding the prohibition. The learned county court judge has found, as I have pointed out already, that, apart from the prohibition, the journey to and from " The Gladstone " to the van was within the sphere of his employment and therefore, if the respondent can satisfy the requirements of that sub-section and show that the act was done for the purposes of and in connection with the employers' business, she is entitled to succeed. (*Wilsons and Clyde Coal Co., Ld.* v. *M'Ferrin.* (1)) The learned county court judge has found that " at the moment when he met with the accident Knowles was doing something for the purpose of his employers' trade or business, namely, mounting his van." On this finding of the learned county court judge, the act here which caused the accident was the act of mounting the box seat. On this, the learned county court judge has found that at the time he met with his accident he had resumed his employment. He says : " He had duties to perform in relation to his horses and van beyond those which he performed

(1) [1926] A. C. 377 ; 19 B. W. C. C. 1.

when on the box seat." He goes on: "I do not think it makes any difference that, in this particular instance, those two duties were rendered necessary by the fact that he had placed the chain on the wheel and removed the trace in order that the van might be left with greater safety while he was visiting 'The Gladstone'." And he concludes on this matter: "I do not think there can be any doubt that, at the moment when he met with the accident, Knowles was doing something for the purpose of his employers' trade or business, namely, mounting his van."

With every respect to the learned county court judge, it is just here that my doubts begin. If the right conclusion be that on this occasion, whatever might be true on other occasions, Knowles left his box seat for a prohibited purpose, the question whether in remounting the box, which was the last stage of the execution of his prohibited purpose, he was or was not doing something for the purpose of his employers' business is not an easy one. However, the matter is not free from authority. If a man, for his own purposes, deliberately goes away from the place where he was employed, and meets with an accident on the way back before he reaches the point where he should be to do his duty, the judge is justified in finding, prima facie, that the accident did not arise in the course of his employment. (*Warren* v. *Hedley's Colliery Co.* (1) per Cozens-Hardy M.R.) In *Davies* v. *Gwauncaegurwen Colliery* (2) a miner was in the habit of hanging his coat on a nail in a disused portion of a colliery which had been barred off; he was subsequently found fatally injured in a hole in the prohibited area. The county court judge held that the man was in a prohibited area for his own purposes only and that at the time of the accident he was not doing anything for the purpose of or in connection with his employers' trade or business. On this second finding, Atkin L.J. says (3): "He was going out of the prohibited area and going back to a place to commence his work. It is idle to

(1) 6 B. W. C. C. 140. (2) [1924] 2 K. B. 651; 17 B. W. C. C. 181.
(3) [1924] 2 K. B. 665; 17 B. W. C. C. 197.

say, that while doing that and returning from a prohibited area, he was getting into the proper place of his employment for the purposes of his master's trade or business." In *Brice* v. *Edward Lloyd, Ld.* (1), which was a case of a man who elected to take his lunch on a tank in the pump room, though a dining room was provided, and who in getting off the tank to return to work fell through an aperture and was scalded, there being no express prohibition, it was held that, in the language of Farwell L.J. (2) : " A workman's employment is not confined to the actual work upon which he is engaged, but extends to those actions which by the terms of his employment he is entitled to take or where by the terms of his employment he is taking his meals on the employer's premises. But the employment does not extend to the doing of things which are unreasonable or which he is expressly forbidden to do." In *Borley* v. *Ockenden* Sargant L.J. says (3), speaking of the words, " for the purposes of and in connection with the employer's trade or business," " I think that means that the workman must shew that he was acting bona fide in the employer's interest. I think that in the present case the workman fails to shew that . . . . I think that the workman could only have taken advantage of s. 7 if he could have shewn that the act was done with the main object of furthering the employer's business." In *Garrallan Coal Co.* v. *Anderson* or *Devlin* (4) a miner, who was killed in a shaft bottom, where it was held he had no right to be in breach of regulation, failed to prove that the act was for the purposes of his employers' business. These cases may be contrasted with that of *Wilsons and Clyde Coal Co., Ld.* v. *M'Ferrin* (5), where the workman had actually got back to the place where he was required to be to do his work.

Applying the principles contained in this class of case, I find it impossible to say that this man was doing anything for the purpose of his employer's business until he had mounted the van to perform his duty to drive, and I think that until that time he was concerned only for his own purposes to get back into a position to perform his duty, an ability to do which he had himself interrupted for his own purposes.

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(1) [1909] 2 K. B. 804 ; 2 B. W. C. C. 26.

(2) [1909] 2 K. B. 809 ; 2 B. W. C. C. 30.

(3) [1925] 2 K. B. 338 ; 18 B. W. C. C. 67.

(4) [1927] A. C. 59 ; 19 B. W. C. C. 356.

(5) [1926] A. C. 377 ; 19 B. W. C. C. 1.

In the face of this difficulty, Mr. Shakespeare for the respondent endeavoured to say that the question was one of fact. I have already commented on the fact that the learned county court judge appears to have taken for granted that, once the man was mounting the van, he was doing something for the purpose of his employers' trade or business, though in truth, as I see it, he was but getting into the proper place of his employment for such purpose within the meaning of Atkin L.J.'s definition in *Davies'* case. (1) In *Estler Brothers* v. *Phillips* (2) there was no question but that the county court judge had rightly directed himself, but here a question of misdirection does arise. The problem which I have indicated, which has caused me much difficulty, was not, I think, considered by the learned county court judge. He does not seem to have considered that, apart from his own purposes, the man would never have left his box. In *Taylor* v. *Lock* (*No.* 1) (3) where a man was killed mounting a lorry after he had descended to obtain some tobacco, I do not think that the question here to be decided was considered at all. Indeed, all the indications are that the Court acted on the assumption that the employment was uninterrupted, as indeed might well have been the case here had there been no express prohibition.

For these reasons I have come to a conclusion in favour of the appellants; I think that it is necessary for the respondent, having regard to the fact that the act done of leaving the van and returning to it was an act not within the deceased's duty or sphere of employment, to bring herself within sub-s. 2 of s. 1 of the 1925 Act. In order to do this it must be shown that the act which caused the accident was done for the purpose of, as well as in connection with, the employer's business. I think the evidence shows that that act, which was the mounting of the box, though ordinarily incident to the deceased's employment, was done on this occasion not for the employers' purposes, but to enable the workman to resume his wrongfully interrupted employment, and to get back into the place where he could again perform his duty.

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(1) [1924] 2 K. B. 651, 665; 17 B. W. C. C. 181, 197.

(2) 127 L. T. 73; 15 B. W. C. C. 291.

(3) 142 L. T. 537; 23 B. W. C. C. 55.

The respondent consequently cannot avail herself of sub-s. 2 of s. 1, and therefore it is not possible to say that this accident arose in the course of the employment, for it is not part of a man's employment to do an act, no part of his duty, which has been forbidden by a genuine and express prohibition.

GREENE L.J. The workman in this case left the box of his van and went to a neighbouring public-house for the purpose of drinking a glass of beer. In so doing he was committing a breach of his duty and that breach was one which would have continued until such time as he might take up his duty again. The relevant rule made by the company by which he was employed is as follows: "Employees must not consume intoxicating liquor while on duty," and the dominant purpose of the workman in leaving his seat on the box was to do something in breach of this rule.

Two main questions arise for decision. The first is whether the accident which happened to the workman as he was climbing on to the box arose out of and in the course of his employment within the meaning of s. 1, sub-s. 1 of the Act. In my judgment this question must be answered in the negative. The workman left his employment for purposes of his own. He ceased for the time being to do the work which he was employed to do and he did so not for the purpose of doing some act reasonably incidental to his employment in respect of which the employer must be taken to have given an implied permission, but for the purpose of doing something which was expressly forbidden. It may very well be the case that a man employed, as this workman was employed, is entitled where circumstances justify it, to leave the actual work which he is employed to do for the purpose of obtaining liquid refreshment. If that be the case it is because under his contract of employment permission to do so, as a matter reasonably

C. A.
1936

Knowles
v.
Southern
Ry. Co.

Greene L.J.

incidental to his employment, is to be implied. Where an act which but for a specific prohibition might in appropriate circumstances be considered as reasonably incidental to the actual work which he is paid to do (as distinguished from an act which is in truth a part of that work) is expressly prohibited, it is in my judgment impossible to say that an accident which takes place in the course of doing that act arises in the course of his employment. In truth the contrary is the case.

It is convenient here to deal with a view of the learned county court judge, which, although only expressed by way of dictum and not as the basis of his decision, has a bearing on this question. He held that the prohibition in question is a rule regulating the conduct of a man in his employment and not a rule which limits the scope of his employment. He held that the question whether the rule falls into the one category or into the other is a question of fact. In so holding he was, in my opinion, wrong. The well-known division of rules into these two categories is merely a convenient aid for answering the question—Is the rule of such a character that an act committed in breach of it is an act done or not done in the course of the employment ? When all relevant facts are found, this question is, in my judgment, without any possibility of controversy a question of law. Further, I think that the distinction between the two classes of rule has no real relevance to a rule which does not apply to the actual work which the workman is employed to do, but applies only to incidental matters arising during the period of employment—at any rate, where the breach of the rule does not take place at the time when the actual work is being performed, as might, for example, be the case with a rule against smoking. If, as in the present case, a man in order to break a rule which deals with incidental matters leaves the work which he is employed to do, he does, in my opinion, necessarily take himself out of the scope of his employment until, the incidental matter having been completed, he returns to the place where it was his duty to be.

But this does not dispose of the matter. If a man leaves the place of his employment for the purpose of doing something which he was not employed to do in breach of a rule which forms part of his contract of employment and afterwards returns to his duty and resumes his work, an accident which takes place after that return and after that resumption is none the less an accident arising in the course of his employment because he had previously left his employment. It is a question of fact in each case whether or not at the time of the occurrence of the accident the man had returned to his place of employment and resumed his duty. In the present case the workman while returning from his excursion to the public-house came back to his van, released the chain from the wheel and replaced the near-side trace; and the learned county court judge finds that after replacing the trace he took the reins in his hand and was in the act of mounting to his box seat when, probably owing to the fact that his horses started to move off at that moment, he slipped and fell under the wheel of the van. He also found—and this is the basis of his decision—that at the time of the accident the workman had resumed his employment and the reason which he gives for this finding is as follows: "He had duties to perform in relation to his horses and van beyond those which he performed when on the box seat. It was his duty to remove the chain and replace the trace. I do not think it makes any difference that, in this particular instance, those two duties were rendered necessary by the fact that he had placed the chain on the wheel and removed the trace in order that the van might be left with greater safety while he was visiting 'The Gladstone.' Even if his visit to 'The Gladstone' was for his own purposes, it was his duty to put on the chain and remove the trace before leaving his van." I am unable to agree that this reason can support the finding so as to make it an unassailable finding of fact. The necessity for removing the chain, replacing the trace and climbing back on to the box had arisen and arisen only because the workman had left the place where it was his duty to be. If the question be asked: Why was the workman in the place where he was and performing the acts which he was performing when the accident happened?, there can in my opinion be only one answer. It was because he had wrongfully left his work and was engaged in returning to it. It was not, in any relevant sense, because he was carrying out some duty which he owed to his employer that he removed the chain, replaced the trace, and started to climb on to the box. It was because of his own breach of that duty that he did these things. The reasoning of the learned county court judge is in conflict with that of Lord Cozens-Hardy when Master of the Rolls in *Everitt* v. *Eastaff & Co.* (1) There a carter for purposes of his own returned to his employer's yard by a roundabout route, and stopped at a public-house to drink. He then climbed back into the cart and while driving to the yard he was thrown out of the cart and killed. It was argued that the man's duty was to take care of his master's horse and cart and that however long he may have been getting back if he deviated from the ordinary route on an excursion of his own, so long as he took the horse and cart with him, any accident which happened to him while driving the horse back to the yard would be an accident arising out of and in the course of the employment. It was argued that taking the horse back to the yard was part of his duty, that the accident happened in the performance of that duty, and therefore the employers were liable. The learned Master of the Rolls emphatically rejected that argument and his judgment was concurred in by Buckley L.J. and Hamilton L.J. as they then were. A similar point arose in *Warren* v. *Hedley's Colliery Co.* (2) In *Martin* v. *J. Lovibond & Sons, Ld.* (3) no breach of duty was committed by a drayman who left his dray for the purpose of getting drink since there was no prohibition against his doing so, and on the facts of that case it was reasonably incidental to his employment to leave the dray at the time when he left it in order to obtain some reasonable refreshment. It was not the case of a man deserting his duty for the purpose of doing a forbidden act.

Davies v. *Gwauncaegurwen Colliery* (4) was a case where a man went into a prohibited area for the purpose of hanging up his coat, and on his return therefrom fell into a hole in that area. Atkin L.J., as he then was, says (1) speaking of this area : " He had no business to go there ; it was completely railed off, and he could only go there by getting over or under the rail ; and what he was doing there he was doing for his own purposes. The fact that he had completed his own particular purpose of hanging up his coat and was returning to his screen is just as irrelevant as the fact that in *Brice* v. *Edward Lloyd, Ld.* (2) the man had finished eating his meal and was getting off the tank. He was going out of the prohibited area and going back to a place to commence his work. It is idle to say, that while doing that and returning from a prohibited area, he was getting into the proper place of his employment for the purposes of his master's trade or business." It appears to me to make no difference that the man in this case left his place of employment for the purpose of doing something which was in breach of a rule against drinking intoxicating liquor. An area to which a man goes for the purpose of breaking such a rule is in my judgment just as much a prohibited area as was the area in *Davies'* case. (3)

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(1) 6 B. W. C. C. 184, 187.

(2) 6 B. W. C. C. 136.

(3) [1914] 2 K. B. 227; 7 B. W. C. C. 243.

(4) [1924] 2 K. B. 651; 17 B. W. C. C. 181.

Reliance was, however, placed on the decision of this Court in *Taylor* v. *Lock.* (4) In that case the driver of a steam lorry left the lorry for the purpose of obtaining some tobacco from his father who was working in a field adjoining the road and also, apparently, of relieving himself. On his return to the road he signed to the steersman to drive the lorry towards him, and in attempting to board the lorry while in motion he fell and was killed. The learned county court judge in that case found, as I read the extract from his award, that the man had left the lorry for purposes of his own and therefore left his employment, and that consequently the accident which took place before he returned to the place of his employment did not arise in the course of his employment. It was held by this Court that the real question to which the learned

(1) [1924] 2 K. B. 665 ; 17 B. W. C. C. 197.

(2) [1909] 2 K. B. 804 ; 2 B. W. C. C. 26.

(3) [1934] 2 K. B. 651 ; 17 B. W. C. C. 181.

(4) 23 B. W. C. C. 55, 444.

county court judge should have directed his mind was whether or not the man's negligence in attempting to mount a moving lorry was so marked as to take his action in doing so out of his employment. It is said that this decision must be treated as a decision to the effect that the man who had left his employment for purposes of his own must be taken to have come back within his employment the moment that he set himself to regain the driving seat of his lorry. I cannot so read the decision. No reference to any such point is to be found in the judgment either of Scrutton L.J. or of Slesser L.J., and I cannot believe that if they had intended to decide any such point they would have passed it over in silence. It is to be observed, moreover, that none of the authorities to which I have referred, except that of *Warren* v. *Hedley's Colliery Co.* (1) were cited, a fact which appears from the report in the Law Journal. (2) As I read these judgments, they are much more consistent with the view that the Court thought that in leaving his lorry in the circumstances he was not deserting his work, but was merely doing something as reasonably incidental to it as if he had stopped to buy tobacco at a tobacconist's. On that hypothesis, no question as to his having returned to his duty would have arisen since he never would have left it. When the case came back to this Court it was heard by Lord Hanworth M.R. and Lawrence and Slesser L.JJ. Slesser L.J., who was the only member of the Court who was present on both occasions, states his recollection of what had taken place at the first hearing as follows (3): "The question was first, Had there been an interruption of the employment; and second, Had the workman hazarded some risk that took him out of the employment. The Court of Appeal came to a conclusion on the first point in favour of the workman." It was, of course, on the second point that the matter was sent back to the learned county court judge.

But although I think that this case cannot be treated as a decision on the point with which I am now dealing, it does nevertheless contain a dictum by Romer L.J., who was a member of the Court at the first hearing, which supports the respondent's argument. He says (1): "I will assume that when he got down from the engine and entered the field where his father was working he did it solely for the purpose of getting some tobacco from his father, and that in so doing he temporarily left his employment. Assuming that, having temporarily left his employment, it was his duty to his employer to re-enter the employment as soon as possible, and, in my opinion, when he was—on the assumption that I have made—getting up on the step to get into the steam engine again he had re-entered his employer's employment." This observation of the learned Lord Justice does not, as I read it, mean that any accident which happened to the man while returning to his employment would have been an accident arising in the course of the employment. It means that on the facts of that case the man had, at the moment when the accident happened, actually re-entered the employment, and if that were so the accident must have happened in the course of it. Romer L.J. proceeded to quote a passage from the judgment of Cozens-Hardy M.R., in *Warren* v. *Hedley's Colliery Co.* (2) to the effect that "if the workman goes where it was not his duty to go and practically gets back and resumes his work before the accident happens, the fact that he went away does not in any way disentitle him to the protection of the Act." It is, I think, on the word "practically" in this passage that the dictum of Romer L.J. is based, but the use of that word by Cozens-Hardy M.R., is, I think, intended to cover the case where a man has substantially reached the point where according to his duty he ought to be and where he would have been if he had not deserted it. In the same judgment Cozens-Hardy M.R., uses a phrase which to my mind shows that by the word "practically" he was not contemplating a case where some substantial movement was required before the man could be said to be back at his post of duty. He says (3): "I think if a man for his own purposes deliberately goes away from the place where he was employed, and meets with an accident on the way back before he reaches the point where he should be to do his duty, the Judge is justified in finding, prima facie, that the accident did not arise in the course of his employment." It is in my respectful opinion important not to approach the question whether the man has reached the point where he should be to do his duty from the point of view merely of the number of feet or yards which lie between the place where the accident happened and the place where he ought to be. It is the nature of the intervening space as well as its dimensions which must be considered. If that space, for example, is a danger zone, as it might well be in a mine or a quarry, the fact that it is comparatively small and quite close to the point where the man ought to be would not, in my judgment, make it proper to say that, while he was in the act of crossing it, he had reached or practically reached the point where he ought to be. So in the present case the distance which lay between the point where the accident happened and that where the man ought to have been was comparatively short but, as events proved and as any one who knows the habits of horses can believe, it was one in which there was risk of accident. The man had no right to be at the spot where the accident took place. It was a dangerous spot and the fact that it was physically quite near to the place where he ought to have been appears to me to be quite insufficient on principle to satisfy what I conceive to be the true test. In any event, the observations of Romer L.J. amount to no more than a statement of his view upon the facts of the particular case before him.

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(1) 6 B. W. C. C. 136.

(2) 99 L. J. (K. B.) 245.

(3) 23 B. W. C. C. 458.

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(1) 23 B. W. C. C. 63.

(2) 6 B. W. C. C. 138.

(3) Ibid. 140.

The other point arises under sub-s. 2 of s. 1, and can be dealt with quite shortly. In order to obtain the benefit of that section the workman must show that the act was done "for the purposes of and in connection with his employer's trade or business." It seems to me that the act done by the workman in this case was quite clearly done for his own purposes and not for those of his employers' trade or business. It was to please himself that he chose to go to a public-house to drink beer. I cannot see how it can be for the employers' purpose to do a thing of this nature when the employers have expressly prohibited it. Here, also, it is important to observe that the act was not an act which he was employed to perform. If a man is employed to work an engine for his employer and in breach of a regulation works it in a prohibited way, he is nevertheless working it for his employer's purposes. But where the act is not an act which the man is employed to perform but is merely an incidental act such as taking refreshment, the position appears to me to be very different, and if he chooses, having two ways of doing such an incidental act, to select the prohibited one in order to please himself, he is acting for his own purposes and not for those of his employer. I say two ways because a driver who is suffering from thirst, if it is necessary for him to obtain liquid refreshment, can select for the purpose intoxicating or non-intoxicating drink. If the former is forbidden to him and he nevertheless chooses it, his act in going to get it is an act done for his own purposes to satisfy his own tastes.

The sub-section uses the words "if such act was done." The word "act" refers back to the word "acting" in the phrase "notwithstanding that the workman was at the time when the accident happened acting in contravention" of a regulation or order. In my opinion in the present case the act which was being done by the workman at the time when the accident happened cannot be treated as though it was merely the act of climbing on to the box. The nature, quality and purpose of that act must, I think, be determined by reference to the entire action of the workman of which it formed part—namely, leaving his employment for purposes of his own and returning to it in order to regain the place which he never ought to have left.

Reliance was placed by the respondents on the decision of the House of Lords in *Thomas* v. *Ocean Coal Co.* (1), but in that case there was no question of the man deserting his employment for purposes of his own. As Lord Buckmaster said (2): "It arose out of his employment certainly, and was, in my opinion, in the course of it, seeing that apart from the prohibition, the action, although hazardous, was due to the man's desire to expedite the process he was engaged to control." The case was not one like the present where the man had taken himself right outside the scope of his employment by abandoning his duty and going off on an excursion for his own purposes.

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(1) [1933] A. C. 100; 25 B. W. C. C. 436.

(2) [1933] A. C. 110; 25 B. W. C. C. 446.

I agree that the appeal should be allowed.

Scott L.J. The details of the facts have been sufficiently stated in the judgments already delivered. The crucial facts are few; they are these: (1.) The appellant company had a rule which said " Employees must not "—these words were printed in large capitals—" (v) consume intoxicating liquor while on duty." The rule was in a book of rules, a copy of which the learned judge finds as a fact had been given to the deceased man, a carter, whose duty it was to drive a horse van. There is no doubt that the rule was well known to the employees of the company. (2.) On the evening when the accident occurred he left his horses and van, and went away some distance up a side street to a public-house for the purpose of getting a glass of beer. Whilst there he passed water, but the judge found as a fact that his dominant purpose in going to the public-house was to get the beer—as he was in the habit of doing. (3.) When he got back he put the van and horses back into a starting position, and was himself " in the act of mounting to his box seat," but for some reason—probably because the horses started before he was ready, as found by the learned judge—he slipped, fell and was fatally injured.

These facts—all found by the learned judge—are sufficient to dispose of the case, and in my view it is unnecessary to consider any others.

The first question of law arises under s. 1, sub-s. 1, of the Act, and is whether the legal effect of the prohibition of intoxicants was to put a servant's departure from the post of duty in quest of forbidden drink outside the sphere of his employment, or merely " to regulate his conduct within it," the test which was propounded and analysed by Lord Dunedin in *Plumb's* case (1), although he there took care to point out that the test is not always exhaustive.

The learned judge answered this question by holding that the rule did not limit the employment, but only regulated the workmen's conduct within the sphere of their employment, from which it would follow necessarily that the applicant would be entitled to an award. But this was in my view an erroneous conclusion. I have no doubt whatever that so important a rule, applicable, as was proved in evidence, to the company's horse drivers and motor drivers alike, is one which was intended to exclude altogether from the sphere of employment any act in disobedience to the prohibition. Whether it would have that effect if the disobedient workman were in fact at the same moment performing his contractual duties, it is not necessary in this case to decide. It certainly has that effect where a man leaves his work in order to get such drink. In the present case, that inference applies a fortiori on a further ground. When the learned judge held that " apart from the rule Knowles was acting reasonably in going to ' The Gladstone ' for a glass of beer," he meant to express a conclusion that such an act should be regarded as within the employment, because it was reasonably incidental to it. But if it was thus within the employment, it must have been only as a liberty conceded to the workman and not as a contractual duty imposed upon him ; and the effect of a direct and absolute prohibition of intoxicants " on duty " must have been to negative any such implied concession. If a driver is not to leave his post of duty in pursuit of such drink, it cannot be in the course of his employment for him to be absent on such an errand.

In view of the above finding, the judge's decision in favour of the respondent seems to have been given under sub-s. 1 of s. 1 of the Act. If so, it was not necessary for him to consider sub-s. 2 ; but he did in fact add a finding that " at the moment when he met with the accident, Knowles was doing something for the purpose of his employer's trade

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(1) [1914] A. C. 66–70 ; 7 B. W. C. C. 6–10.

C. A.
1936

KNOWLES
v.
SOUTHERN
RY. CO.

Scott L.J.

or business," and cited the case of *Privett* v. *Darracq Motor Engineering Co.* (1) in this Court.

I cannot see the relevance of that case in that context; but it is necessary to consider this finding in favour of the respondent, because it is expressed in the very words of the proviso at the end of sub-s. 2. I think it rests upon a fallacy, and is wrong in law. The continuity of the service once interrupted, as it was as soon as the deceased started to descend from his box seat upon his forbidden errand, it was not possible for it to be resumed until the deceased had completed his excursion and got back to his starting point. Another way of arriving at the same conclusion is to note that if he had continued to do his duty and had never started upon his excursion, he would not have got down where and when he did, and would not have been engaged in the fatal act of climbing up again at the time when and place where he did attempt to climb up. Consequently he was not "doing anything for the purposes of his employer's trade or business" at any time subsequent to the moment of his starting to leave the box on his excursion; and from that moment till and including his fall he was acting for his own private purposes and not for his employer's. Sub-s. 2 does not, therefore, help the applicant.

I have perused the judgments of Slesser L.J. and Greene L.J., and agree with both, including their analysis of the relevant cases; but this case appeared to me to be so plain that I did not think it necessary to discuss the cases. I agree that the appeal should be allowed.

Appeal allowed. Leave granted to appeal to the House of Lords.

Solicitor for appellants: *W. Bishop.*
Solicitors for respondent: *Pattinson & Brewer.*

(1) 151 L. T. 211; 27 B. W. C. C. 163.

R. F. S.

MORLEY *v.* MOORE.

C. A.
1936
April 27, 28.

Insurance—Injury to motor-car—Payment to plaintiff by plaintiff's insurance company of part of damage suffered—Subsequent claim by plaintiff against defendant for full amount—" Knock-for-knock " agreement between plaintiff's and defendant's insurance companies —Direction by plaintiff's insurers to plaintiff not to claim—Effect on plaintiff's claim against defendant.

The plaintiff, whose motor-car had been injured through the defendant's negligence, recovered a sum less than the whole amount of the damage sustained from his insurance company, who, in pursuance of a " knock-for-knock " agreement with defendant's insurance company, requested the plaintiff not to make any claim against the defendant. Nevertheless the plaintiff brought an action in tort for and recovered from the defendant the full amount of the damage:—

Held, that the fact of the request of the plaintiff's insurers did not prevent the plaintiff from recovering, but that he would hold the amount to the extent of the sum received from his insurers as trustee for them, they being subrogated to his rights.

Hirachand Punamchand v. *Temple* [1911] 2 K. B. 330, distinguished.

APPEAL from Bromley County Court.

The motor-car of the plaintiff, the respondent in this appeal, was damaged in collision through the negligence of the defendant, the appellant, to the extent of 33*l.* 2*s.* 8*d.* Under an insurance policy the plaintiff recovered 28*l.* 2*s.* 8*d.* from his own insurance company, being himself responsible, under the terms of the policy, for the balance of 5*l.* In paying him, the insurance company, which had a " knock-for-knock " agreement with the defendant's insurance company—which agreement was not produced in court—directed the plaintiff that they did not want him to claim the sum of 28*l.* 2*s.* 8*d.* from the defendant. This was in pursuance of the knock-for-knock agreement. Nevertheless the plaintiff brought an action against the defendant for 33*l.* 2*s.* 8*d.*, the whole of the damage sustained, and the county court judge gave him judgment for that amount.

The defendant appealed.

F. Soskice for the appellant. The plaintiff's insurance company had the right to be subrogated to the plaintiff's rights against the defendant, and any money which the plaintiff recovered from the defendant would be held in trust for the company—per Vaughan Williams L.J. in *Hirachand Punamchand* v. *Temple* (1)—and the company had renounced any claim thereto. In that case moneylenders, who were owed money by a borrower, accepted a lesser sum from the debtor's father in settlement of the debt, by an agreement to which the debtor was not a party. In spite of this agreement the moneylenders brought an action against the debtor for the balance. It was held that they could not recover, Vaughan Williams L.J. saying (1) that any money they recovered they would hold as trustees for the father, and that under the circumstances of the relations of father and son it was impossible to suppose that the father wished to insist on payment by the son. The present is a stronger case, for the cestuis que trustent, the plaintiff's insurance company, had expressly asked the plaintiff not to make the claim. This action, therefore, was an abuse of the process of the Court. As the company have renounced their right, there is a resulting trust for the amount recovered in the hands of the plaintiff in favour of the defendant.

[*Cook* v. *Lister* (2) and Macgillivray on Insurance, p. 734, were also referred to.]

The contract between the plaintiff and the insurance company was one of indemnity, under which he was entitled to be indemnified, but not to be more than fully indemnified: per Brett L.J. in *Castellain* v. *Preston.* (3) If allowed to retain his judgment he will be far more than indemnified. This case is governed by *Hirachand Punamchand* v. *Temple.* (4)

R. A. L. Hillard for the respondent. *Hirachand Punamchand* v. *Temple* (4) does not apply. In the present case the payments to the plaintiff were in different rights; from the insurance company in contract, from the defendant in tort. In *Hirachand's* case (4) all depended on contract, and by the contract with the father the claim against the son was

(1) [1911] 2 K. B. 330, 337.
(2) (1863) 13 C. B. (N. S.) 543.
(3) (1883) 11 Q. B. D. 380, 386.
(4) [1911] 2 K. B. 330.

extinguished. But in the present case nothing has occurred to extinguish the plaintiff's claim in tort. In *Hirachand's* case (1) payment was made by the father on the terms that no action should be brought against the son. The insurance company attached no such terms to their payment to the plaintiff, though they expressed a desire that no claim should be made.

It is admitted that the plaintiff holds 28*l.* 2*s.* 8*d.* of the money recovered from the defendant as trustee for the insurance company, but the company, as cestuis que trustent, only have the right to direct their trustee as to making a claim if that remedy was their remedy. But here it was the remedy in tort of the plaintiff personally. The law as to subrogation has never gone so far as to say that the cestui que trust can forbid his trustee to exercise the right of the cestui que trust; it only says that if exercised the proceeds are to be held in trust for the cestui que trust. The trust does not arise until the money has been recovered.

Soskice replied.

THE PRESIDENT (SIR BOYD MERRIMAN). This appeal from a judgment of His Honour Judge Konstam raises an interesting point which, as far as I know, is a matter of first impression, at any rate so far as the Court of Appeal is concerned. The plaintiff, in a running-down action before the county court judge, had in respect of the damage to his own motor-car a claim for the sum of 33*l.* 2*s.* 8*d.* He was insured on the terms that he himself was his own insurer for the first 5*l.* of the risk, and was paid the balance, 28*l.* 2*s.* 8*d.*, by his insurance company. He then brought this action against the defendant, and no question arises but that the defendant was liable for this damage. The defendant was also insured, and we are informed, as the county court judge was informed, that there was between these two insurance companies what I am informed is known as a "knock-for-knock" agreement. We have not before us, nor had the county court judge before him, the terms of this agreement, but again we are informed that the purpose of this agreement is that each insurance company

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(1) [1911] 2 K. B. 330.

C. A.
1936

MORLEY
v.
MOORE.

The President.

pays its own assured, without question, that which the assured is entitled to receive under the particular policy and that both of them do their utmost to discourage either of their own assureds from making claims against the other, or, putting it in another way, the insurance companies amongst themselves do not insist upon their assured bringing such action as they may be entitled to bring against the party insured by the other insurance company.

Having stated those facts by way of preface, the point then emerges that in fact the plaintiff in this action claimed the whole 33*l.* 2*s.* 8*d.* against the defendant, and he did so in spite of a definite direction on the part of his insurance company that, for their part, they did not wish him to do so. Can he or can he not include as a substantive head of claim and recover the 28*l.* 2*s.* 8*d.* in respect of which he has been indemnified by his insurance company, as well as the 5*l.* for which he himself has to bear the responsibility? It is to be observed that the supposed disability to sue for the 28*l.* 2*s.* 8*d.* is one which can be insisted upon at the instance of the wrongdoer, under the terms of the insurance policy. It is said that as a matter of law once the plaintiff has been paid by his insurance company under his insurance policy, and that insurance company has disclaimed any desire that he shall attempt to recover the money from the other, the amount ceases to be recoverable as a matter of law. The learned county court judge has held that the sum of 28*l.* 2*s.* 8*d.* was recoverable, and the question is whether he was wrong in so holding.

Mr. Soskice for the defendant, who, if he will allow me to say so, has argued this case most admirably, does not dispute the proposition that a long line of authorities establishes that the mere fact that the plaintiff's own insurance company have paid the particular loss is not a thing which the defendant, the wrongdoer, can set up in diminution of damages, but he contends for this principle: That where a person has a right to recover damages as a trustee for some one else, and the cestui que trust, by his conduct or otherwise, makes it clear that he does not want that right to be exercised and

C. A.
1936

MORLEY
v.
MOORE.

The President.

disclaims any desire to receive the proceeds if recovered, no action lies, and he says that is so a fortiori if the cestui que trust directs that the right shall not be exercised. Mr. Soskice says that that principle, which he submits is established as a universal principle by an authority to which I shall refer in one moment, applies in a case in which the plaintiff's insurance company, having paid the particular loss, have said, whether by agreement with the defendant's insurance company or not, to their own assured, the plaintiff: "We direct you not to sue for that particular loss." I may say, however, and I think this is an important qualification, that Mr. Soskice has not attempted to suggest that there was any fresh contract between the insurance company and the plaintiff disabling him from suing. He says that the right to give this direction, and the consequences flowing upon the giving of this direction from the insurance company, flow automatically from the relationship of insurer and insured under the original policy of insurance.

The authority upon which Mr. Soskice relies is the case of *Hirachand Punamchand* v. *Temple.* (1) As I will show in a moment there are passages in two of the judgments in that case which tend to support, in the circumstances of that case, the particular proposition for which Mr. Soskice is contending; but in order to see how and why the application of the principle is laid down, one must examine quite shortly the facts of that case. The facts were, eliminating irrelevant considerations, that either on a bond, in one instance, or a promissory note in the other, the defendant had borrowed from the plaintiffs, who were moneylenders, various sums of money. Correspondence passed between these moneylenders and the father of the defendant, Sir Richard Temple, and as a result the father remitted sums which were considerably less than the total amount claimed under either head, on the terms that as between himself and the moneylenders those sums were accepted in full settlement of his son's debt. It is manifest that on those facts it only needs one other circumstance to be expressed or implied to make that transaction a complete accord and satisfaction, which would require no further discussion, and that circumstance is that in some way or another the debtor son should be a party to the transaction. Doubt appears to have existed, at any rate in the mind of the majority of the Court, whether in the true sense of the word there could be said to be accord and satisfaction in that case; but it is unnecessary to investigate that further, because it is only on the assumption that there was no accord and satisfaction that the point arises. What was said when the plaintiffs, notwithstanding the acceptance of this money from the father, sued the son for the balance, was: that if it was not accord and satisfaction it might well be that the plaintiffs had ceased to be holders of the promissory note, but that in any case, however that might be, they could be restrained from suing. Vaughan Williams L.J. (1) puts it: " In my judgment, if I am right in saying that any moneys received on the note by the plaintiffs would be held by them in trust for Sir Richard Temple, then, without any question of resort to a court of equity, there might have been a defence in a court of law on the ground that any money recoverable on the note by the plaintiffs was recoverable by them merely as trustees for Sir Richard Temple, and that, under the circumstances disclosed by the correspondence, the relations between the father and son were such that it was impossible to suppose that the father wished to insist on payment of the note by the son." Farwell L.J., having indicated fairly plainly that he really thought the substance of the matter was accord and satisfaction, said (2): " I agree with Fletcher Moulton L.J. that the plaintiffs cannot be heard to say that they have acted dishonestly when an honest construction can be put upon their conduct by treating their acceptance and retention of the money as being upon the terms on which it was offered," and he added: " If there be any difficulty in formulating a defence at common law in such case, I have no hesitation in saying that a court of equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and would have restrained

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(1) [1911] 2 K. B. 330.

(1) [1911] 2 K. B. 337.
(2) Ibid. 342.

them from suing under such circumstances as existed in the present case."

The question, therefore, is whether the principle thus applied to the circumstances of that case applies to this case. We are here dealing with quite a different subject-matter—namely the obligation of an insurance company under their policy of insurance to pay to the plaintiff this amount of 28*l.* 2*s.* 8*d.* It is not suggested that there has been any contractual variation of that contract. The matter rests, as I have already said, on the rights created by the policy of insurance and payment thereunder. The plaintiff had the contractual right to recover under that insurance policy. The plaintiff also had the right to recover damages at common law, including this sum of 28*l.* 2*s.* 8*d.*, against the wrongdoer. How is it then suggested that the enforcement of the one contract bars him from enforcing his common law right to sue? In *Hirachand Punamchand* v. *Temple* (1) the disability imposed upon the moneylenders was due to a contract made between them and the third party. They had already entered into a contract with the son by which he owed them the money, and they chose to enter into a contract with the father which it was held disentitled them to sue, and for my part I find it very difficult to see how a case like that can be applied to a case of insurers and assured in the absence of any subsequent bargain disentitling the plaintiff to use his ordinary common law rights to sue a wrongdoer. It is common ground, and Mr. Soskice has relied on the case which is the foundation of the matter, that the plaintiff's insurance company are entitled to be subrogated to the rights of the assured in respect of the particular loss they have paid. I take those rights in the fullest sense indicated by Brett L.J. in the case of *Castellain* v. *Preston* (2) and add to them any other circumstances which it can fairly be suggested that Brett L.J., although he was clearly intending to be comprehensive, inadvertently omitted; but there is no hint in that judgment of any right on the part of the insurer, instead of taking advantage of the rights which the assured has, to forbid him to exercise those rights. Yet what is said has occurred in this case as the result of the direction by the insurance company that the assured was not to sue the wrongdoer (which for my part I cannot see that they had the slightest right to give) is that if nevertheless he does sue the wrongdoer and recovers the *28l. 2s. 8d.* he recovers it on what is called a resulting trust in favour of the wrongdoer and has to hand it back to him. That is a conception which seems to me to be very like nonsense. It is true that if called upon to do so the assured is obliged to sue or to allow the insurance company to sue in respect of the particular loss that they have paid, and if the assured recovers it he is obliged to hand that sum over to the insurance company because it is impressed with a trust on their behalf; but putting that trust at its highest I am unable to understand how it can be said that the cestui que trust, that is the insurance company, by taking a particular course, which is not warranted by any independent contract, and by disclaiming their own right as a cestui que trust, can impose upon the assured as another cestui que trust the very person from whom at common law he is entitled to recover as damages that which is said to be the subject of the trust. I do not think there is any such thing as a cestui que trust imposing against the will of the trustee some other cestui que trust as a substitute for himself, and I am quite sure there is no such thing as a cestui que trust not merely being able to substitute somebody else against the will of the trustee, but being able to substitute such person on the terms of a different trust. The thing seems to me to be fantastic. Nor is there any need for this elaborate conception. If the insurance company insist upon their rights, those rights are perfectly plain; they can have this sum of *28l. 2s. 8d.* which has been recovered, and the plaintiff has never attempted to say that they may not have it. They have said that they do not intend to take it and that the plaintiff is not entitled to recover it for them, but as far as I can see up to this very moment they have never bound themselves by any obligation not to take that money, if and when the plaintiff offers it to them.

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(1) [1911] 2 K. B. 330.

(2) 11 Q. B. D. 388.

Assuming that the plaintiff still has his two rights: first to recover the 28*l.* 2*s.* 8*d.* from the insurance company on his policy, and, secondly, to recover that same 28*l.* 2*s.* 8*d.* as damages from the wrongdoer, the simple solution of this matter is for the insurance company to do that which they are entitled to do—namely, to ask him to hand them that sum. That is a perfectly simple solution, but I cannot see that the fact that they choose to forgo their right to receive this sum from their assured imposes any obligation upon him. The insurance company may choose to make the assured a present of the 28*l.* 2*s.* 8*d.*, but that does not affect his legal right. I think the sum and substance of it is this: that this case is not in a class which resembles in any particular the case of *Hirachand Punamchand* v. *Temple.* (1) There is lacking, amongst other things, what I think is the essence of that case—namely, that as between themselves and the father, by a bargain which was superimposed upon and subsequent to the original contract between the moneylenders and the son, the moneylenders obliged themselves to accept the money in settlement, and, although it was held there was no accord and satisfaction, the Court held that they had thereby disabled themselves from suing the original debtor. Here there are no facts resembling those facts, and for that reason I decline to apply a case, decided with reference to an entirely different set of facts, in circumstances to which hitherto nobody has ever suggested that it was applicable.

I only want to add one other thing. I hope that the result of this judgment will be that plaintiffs will realize that they still have whatever may be their full rights accompanied by whatever duties result from the exercise of those rights, notwithstanding arrangements made behind the scenes between the insurance companies. If, contrary to the opinion that I have been expressing, the combined effect of an arrangement whereby the assured is regarded as his own insurer for a certain proportion of the loss and of this "knock-for-knock" agreement is seriously to prejudice insured persons when insisting upon the whole of their legal rights, I should wish

(1) [1911] 2 K. B. 330.

C. A.
1936

MORLEY
v.
MOORE.

The President.

to consider whether the agreement were contrary to public policy. It is unnecessary to say more for the moment, but if I were to consider that, I should want to know a great deal more exactly than I do know at present precisely what are the terms of that agreement, and I should wish to hear some further argument upon the subject.

SCOTT L.J. I entirely agree with the judgment of my Lord, and as he has analysed the position at length and with great care I do not want to repeat anything that he has said. But I do wish to observe this: that one of the grounds of appeal put forward by the defendants in the county court is one that I have never seen before. It says this: "The learned judge should in law have held that the said sum of 28*l.* 2*s.* 8*d.* was irrecoverable in law in that a payment of this sum had been made by the plaintiff's insurers to the repairers of the said plaintiff's motor vehicle pursuant to a 'knock-for-knock' agreement made between them and the defendants' insurers and that they had intimated to the said plaintiff before action brought that they waived or abandoned any claim for the return of such sum from the defendants' insurers and directed him not to include the claim for such sum in the action and that the plaintiff in fact abandoned his claim for the said sum of 28*l.* 2*s.* 8*d.* on the hearing of the said action." I will deal with the last point first. The fact that the plaintiff pressed his claim and got judgment for it, shows he did not abandon it. With regard to the rest of the plea, I cannot see any ground in law or equity why it should constitute a defence for the defendant sued for damages for a tort in the action that the plaintiff brought against him.

In addition, I should like to say this: that to put forward a plea resting in part, according to the allegation, upon an agreement which is not produced in court, and the terms of which are not proved, is in my view wrong. If that was an essential part of the plea, in my view the learned judge ought to have refused to have anything to do with the "knock-for-knock" agreement until it had been properly produced and proved before him, in order that he might consider it; presumably it was in writing, and it would be a matter for the interpretation of the court. Be that as it may, I entirely agree with the terms of the judgment of the county court judge. I think he was right in saying that even although the plaintiff's insurers told him that they did not want him to hand over any part of what he might recover from the defendant to the extent of the *28l. 2s. 8d.* in which they were interested, and although they may have told him not to sue for it, and although there was a "knock-for-knock" agreement between them and the defendant's insurers, none of those facts give rise to any defence known to the law or the principles of equity. My view is that there is no right whatever in an insurer to dictate to his assured whether he shall or shall not abstain from enforcing his remedies against a third party which go in diminution of the loss against which the policy is issued; they have an absolute right to require him to enforce his remedies, but, in my opinion, they have no right to prevent him enforcing them. Their right is a right purely consequential on the nature of the contract of indemnity, and it arises because of it being a contract of indemnity, and nothing more. If the assured by some process of recovery, whether by an action at law or by an ex gratia payment, obtains a payment in diminution of the loss, the underwriters or the insurers are entitled to the excess over the amount paid by them to him by way of strict indemnity, and no more. To my mind that is the remedy of the insurers, and that is the only remedy they have in respect of the assured's rights of recovery at common law.

For these reasons I agree entirely with what my Lord has said.

EVE J. I agree. I had difficulty in appreciating, first of all, what was the object of the action, and, secondly, what purpose was to be gained by it if it went to appeal. I agree with what my Lord has said, and I agree with the reasons that he has given for dismissing this appeal with costs.

Solicitor for appellant: *F. W. Pope.*

Solicitors for respondent: *Bishop & Fenton-Jones.*

W. L. L. B.

C. A.
1936
May 14.

MASON AND WOOD, LIMITED *v.* GREENE.

[1934. M. 3457.]

Moneylender—Moneylending transaction—Promissory note as security—Memorandum of contract—Lump sum payable as interest—Statement that it is equivalent to interest at specified rate—Interest calculated in accordance with Sch. I of the Moneylenders Act, 1927*—No statement that it was so calculated—Promissory note and contract unenforceable—Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-s.* 2.

In each of two moneylending transactions secured by a promissory note for payment of 70*l.* by fourteen monthly instalments the memorandum of the contract stated that "the amount of principal being advanced in respect of the said promissory note for 70*l.* is 50*l.*, and the interest charged of 20*l.* is equivalent to interest at the rate of 64*l.* per cent. per annum." The rate of interest was in fact calculated in accordance with the provisions of Sch. I. to the Moneylenders Act, 1927. After default had been made in payment of instalments the assignees for value of the promissory notes, who were also moneylenders, brought proceedings to recover the balance of principal and interest:—

Held, by the Court of Appeal (reversing Macnaghten J.'s decision) that the contracts and promissory notes were unenforceable having regard to s. 6, sub-s. 2, of the Act, because the memorandum failed to state that the rate of interest was calculated in accordance with the provisions of Sch. I. to the Act.

Parkfield Trust, Ld. v. *Curtis* [1934] 1 K. B. 685 discussed and followed.

APPEAL from a decision of Macnaghten J.

The plaintiffs were licensed moneylenders and the holders for value of two joint and several promissory notes given by the defendants, Mr. and Mrs. Greene, to Walter Carr, Ld., who were also registered moneylenders. The promissory notes were dated August 26, 1933, and January 12, 1934, respectively, and were each for 70*l.* repayable by fourteen monthly instalments of 5*l.* each commencing in the case of the first promissory note on October 1, 1933, and in the case of the second promissory note on February 28, 1934. Each of the promissory notes provided that in the event of default being made in payment of the instalments or part thereof then the plaintiffs were to be at liberty at their option to demand payment of the whole of the balance of 50*l.* advanced as principal remaining unpaid together with a proportionate part of the sum of 20*l.* charged for interest to the date of such demand, and thereupon the whole of the said balance of principal and interest to such date should immediately become due and payable and such balance of the said principal sum and interest so remaining due as aforesaid should bear simple interest at the rate of 64*l.* per cent. per annum from the date of such demand until payment.

Both of these promissory notes were given as security in respect of moneylending transactions, and there were memoranda of the contracts of the dates of the corresponding promissory notes in substantially the same terms. The memorandum of January 12, 1934, was as follows: "Note or Memorandum of Contract for the proposed advance to be made by you to us this 12th day of January, 1934, of the sum of 50*l.* on a joint and several promissory note for 70*l.* payable to Walter Carr, Ld., or order at No. 16 Maddox Street, W.1, or at such other place as they may direct by 14 consecutive monthly instalments of 5*l.* each commencing on the 28th day of February, 1934, and in the event of default in payment of any instalment or part thereof, then the said Walter Carr, Ld., shall be at liberty at their option to demand payment of the whole of the balance of the said sum of 50*l.* remaining unpaid together with a proportionate part of the sum of 20*l.* charged for interest to the date of such demand and thereupon the whole of the said balance of principal and the proportionate part of the interest as aforesaid shall immediately become due and payable and such balance of the said sum and interest so remaining due as aforesaid whether in respect of principal or interest shall bear simple interest on that sum at the rate of 64*l.* per cent. per annum from the date of such demand until payment, and until such demand to continue to pay the said monthly instalments and all monies paid on account of the said advance and interest shall be applied firstly in payment of the interest due to that date and then to principal. The amount of principal being advanced in respect of the said promissory note for 70*l.* is 50*l.*, and the interest charged of 20*l.* is equivalent to interest at the rate of 64*l.* per cent. per annum. . . . ."

After making certain payments the defendants made default in the payment of the monthly instalments, and demand was unsuccessfully made for payment of the balance of the principal and interest. By a writ dated November 8, 1934, the plaintiffs, who were the assignees of the promissory notes, brought these proceedings for the sums due on the promissory notes with interest thereon. The defendants set up the defence (amongst others) that the promissory notes and contracts were not enforceable because s. 6 of the Moneylenders Act, 1927, had not been complied with in that the interest charged not being expressed in the terms of a rate per cent. per annum the memoranda did not state (as was the case) that the rate per cent. per annum represented by the interest charged was calculated in accordance with the provisions of the First Schedule to the said Act.

Macnaghten J. said that it was suggested that the memoranda did not comply with s. 6, sub-s. 2, of the Moneylenders Act, 1927 (1), because they did not state that the rate of interest was ascertained in accordance with the First Schedule to the Act. He did not think the judgments of the Court of Appeal in *Parkfield Trust, Ld.* v. *Curtis* (2) could be taken to mean this as a general proposition, as was alleged on behalf of the defendants. Every judgment must be read in view of the facts before the Court. What was there at fault was that the memorandum had mixed up two methods of ascertaining the rate of interest and attained an incorrect result. Here it was plain that the moneylenders were not charging interest at a rate per cent. per annum. It seemed to him (his Lordship) that the words "calculated in accordance with the Schedule" were unnecessary, because it was stated

(1) The Moneylenders Act, 1927, s. 6, sub-s. 2, provides: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

(2) [1934] 1 K. B. 685.

C. A.
1936

MASON AND WOOD, LD. *v.* GREENE.

that the sum of 20*l.* represented interest at the rate of 64*l.* per cent. per annum.

The defendants appealed.

Gerson Newman for the appellant. It has been admitted that the rate of interest stated in the memoranda and promissory notes were arrived at in accordance with the provisions of Sch. I. to the Moneylenders Act, 1927. Sect. 6, sub-s. 2, of the Act has not been complied with, as the memoranda do not show whether 64*l.* per cent. is a true rate of interest or calculated in accordance with the Schedule. It is clear that in fact the Schedule was applied as permitted by s. 15, sub-s. 2, of the Act, and therefore it must be so stated in the memorandum of contract provided for by s. 6: *Parkfield Trust, Ld.* v. *Curtis.* (1) There was a decision by all the judges to that effect, although it is stated to be a decision of two judges only in the report in the Law Reports.

[SLESSER L.J. I think the passage in the judgment of Lord Hanworth M.R. was added on revision.]

In the report in the Law Journal (2) Romer L.J. expressly associates himself with what Slesser L.J. had said, but that does not appear in the Law Reports.

[SLESSER L.J. This supports the view that the passage in Lord Hanworth's judgment was added on revision, and that Romer L.J., being aware of its addition, made the alteration in his judgment.]

In any case there is an express decision of the Court of Appeal which is directly applicable to this case.

[He was stopped.]

R. F. Levy for the respondents. If the observations in *Parkfield Trust, Ld.* v. *Curtis* (1) are of general application, it is impossible to distinguish them; but they were made in reference to the particular facts of that case. The Act provides two ways of stating the interest, and in that case the interest was stated in both ways so that both could not be correct. Since both ways were stated the Court said that the memorandum must make it clear which of them was really

(1) [1934] 1 K. B. 685.

(3) 103 L. J. (K. B.) 609, 612.

adopted. That does not apply when the memorandum is clear. Here the lump sum charged for interest is stated to be " equivalent " to the specified rate per cent. It is clear then that the rate of interest was calculated in accordance with the Schedule.

[SLESSER L.J. I regard the passages which have been referred to in *Parkfield Trust, Ld.* v. *Curtis* (1) as telling moneylenders what is essential in all cases when resort is had to the Schedule.]

If so, it is suggested that the statements were only dicta on a point which had not been argued. The Court would, it is submitted, have come to a different conclusion after argument. There are no words used in s. 6 to justify the conclusion that it must be stated in the memorandum when resort is had to Sch. I., and the Court will not read into the Act something it does not contain. Sect. 6, sub-s. 2, states the two alternative modes of calculating interest, but it does not say that the memorandum is to contain a statement which mode is adopted.

[No reply was called for.]

SLESSER L.J. This appeal succeeds. It is an action on two promissory notes, the first dated August 26, 1933, for the sum of 70*l.*, repayable by fourteen consecutive instalments of 5*l.* and a later one of January 12, 1934, also for 70*l.* similarly repayable.

These moneys were advanced and payments were made from time to time, and an agreed statement has been drawn up between the parties showing how much is attributable to the repayments of the amount advanced and how much is attributable to payment of interest. I do not think it necessary in the circumstances of this case to go into them in detail. The action is now brought with regard to the balance, as it is alleged, of the money owing.

It is necessary, this being a money lending transaction, that it should comply with the requirements of the Moneylenders Acts, and particularly with s. 6 of the Moneylenders Act, 1927. It is said here on behalf of the defendants that the memorandum does not comply with sub-s. 2 of s. 6 of the Moneylenders Act, 1927, and therefore that the action cannot succeed. The memoranda of August 26, 1933, and January 12, 1934, are to the same effect. [His Lordship then read the memorandum of the later date.]

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(1) [1934] 1 K. B. 685.

It is clear that 64*l.* per cent. per annum being the equivalent interest which is said to be reached by considering the lump sum of 20*l.* charged as interest on the loan of 50*l.*, this is not a case where the interest charged on the loan is expressed in terms of a rate per cent. per annum. This rate is computed, as indeed it may be computed, under the Moneylenders Act, 1927, s. 15, sub-s. 2, where there is no interest on the loan charged expressed in terms of a rate per cent. per annum " as calculated in accordance with the provisions of the First Schedule to this Act." It is not necessary to consider that Schedule ; it is sufficient to say that in this case the parties agree that the calculation in accordance with the Schedule of these figures does bring out a rate, as is stated, equivalent to interest at the rate of 64*l.* per cent. per annum. But it is objected here by the appellants that the memorandum is not sufficient because, while it does say that the interest charge of 20*l.* is equivalent to interest at the rate of 64*l.* per cent. per annum, it does not go on to say that that sum represents interest at this rate as calculated in accordance with the provisions of the First Schedule to this Act.

In my opinion, this question has been decided by the authority of this Court, in *Parkfield Trust, Ld.* v. *Curtis.* (1) It is true, as Macnaghten J. points out in his judgment in this case, that the facts of that case and the immediate problem there to be considered were different in some respects from those arising in the present case. In that case there was an agreement to lend a sum of 500*l.* in consideration of the additional sum of 150*l.*, the whole sum of 650*l.* to be repaid by two instalments of 325*l.* each paid at the end of the first and second months. In the memorandum of the contract the loan was stated to be payable with interest at the rate of 240*l.* per cent. per annum and upon the terms

(1) [1934] 1 K. B. 685.

of the promissory note of that date. The promissory note contained a promise to pay 500*l.* together with interest at the rate of 240*l.* per cent. per annum, such sum of 500*l.* to be paid together with interest then due by consecutive monthly instalments of 325*l.* each. It was not stated there whether the rate was or was not calculated in accordance with the First Schedule. It was held there that the rate of interest was incorrectly stated in the memorandum, because if one had regard to the rate of interest then stated and to the provision as to repayment in two instalments, the second instalment should have been 330*l.*, and not, as stated, 325*l.* The question then arose whether in reality the rate of interest had been calculated on the basis of the First Schedule to the Act, and the further question immediately arose whether it was open to treat the matter in such a way having regard to the fact that there was no mention in the memorandum of the interest having been treated as a notional rate under the Schedule to the Act. Mr. Neville Laski in argument is reported as saying (1): "The rate of interest was correctly stated in the memorandum having regard to the terms of s. 6, sub-s. 2 . . . . The rate of interest must, under s. 6, sub-s. 2, be calculated as provided in the First Schedule to the Act, and when so calculated 240*l.* per cent. per annum is found to be correct." On that, the Court must have had brought to mind immediately the question whether it was at all possible to treat the rate of interest as being calculated under the First Schedule to the Act having regard to the form of the memorandum which appeared to treat the interest charged as a true rate of interest. It was for that reason no doubt that all their Lordships thought it right to express an opinion as to the possibility of the assumption that the interest was calculated in the manner provided in the Schedule, and with every respect to Macnaghten J., I cannot agree that the facts of that case did not, in themselves, raise the question whether, if recourse was to be had to the First Schedule in order to justify the rate of interest specified, it would not have been necessary so to state in the memorandum. However that may be, we have in express terms, as I read it, an opinion of Lord Hanworth on this point. After discussing the question of the interest he says: " That being so, I turn back to the provision in s. 6, sub-s. 2, of the Act that the note or memorandum shall show ' either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act.' We are asked to amalgamate those alternative provisions and by some such method to arrive at the view that 240*l.* per cent. per annum is really the rate of interest." Now, that reference of my Lord to the request to amalgamate the provisions shows clearly that reliance was being placed in part upon the alternative second limb of calculation of the rate of interest by reference to the Schedule. Then he goes on (1): " That is in my view impossible. As I have pointed out already, the Act is intended to be exacting, and this compels us to read s. 6, sub-s. 2, precisely as it stands. When we do that it is clear that the memorandum with the promissory note attached does not contain what is required, with the result that the contract cannot be enforced." So far, it may be, Lord Hanworth was speaking of the discrepancy in the rate of interest, but he goes on thus: " I would add that if the computation of the rate per cent. of interest be made under the First Schedule "—that is the fact in the present case—" then I think that the note or memorandum, after stating the amount of the instalments to be paid, should explain that they included interest at whatever rate of interest per annum was ascertained from the First Schedule to the Act, and that this rate of interest has been found under that Schedule." Then I myself after saying that I agree that the appeal should be dismissed for the reasons stated by the Master of the Rolls, add this (2): " In other words, there may be either a true rate of interest or a notional rate per cent. per annum arrived at under the Schedule. In these circumstances I do not think that the requirements of the section are fully complied with unless it is in the note or memorandum stated in terms whether the rate of interest therein mentioned is a true rate of interest or a rate per cent. per annum calculated in manner provided in the Schedule." I do not think I meant there to say that if the interest appears on the memorandum to be a true rate of interest it has got to be so stated in express terms. But if it is a rate per cent., calculated in the manner provided in the Schedule, I cannot read the language as saying anything but that this must be stated. Then I go on to say what has been said so often in these cases, that " The object of the sub-section is to provide for the borrower and the Court a true note of the transaction, and to my mind it is not stating the true terms of the contract and so complying with the requirements of the sub-section to speak of a rate of interest simpliciter when the rate stated is not part of the agreement between the parties but only a rate which has been ascertained by reference to the Schedule."

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(1) [1934] 1 K. B. 688.

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(1) [1934] 1 K. B. 692.

(2) Ibid. 693.

Romer L.J. in the report of this case in the Law Journal (1) goes on to say : " I agree with both the judgments delivered and I desire expressly to associate myself with what Slesser L.J. has said." That can only have reference to the particular observations I had just made with regard to the necessity for stating that the rate of interest was calculated in manner provided in the Schedule. Those words do not appear in the copy in the Law Reports, but it may be that at one time the report suffered revision and that this may be the explanation. But as I understand, my Lord had no intention in leaving those words out to dissent at all either from what Lord Hanworth is reported as having said (2) or what I said expressly. (3)

Now can it be said in this case—and this is the final matter—that the phrase " the interest charged of 20*l.* is equivalent to interest at the rate of 64*l.* per cent. per annum " satisfies the requirements of the Act ? In my opinion, it is not possible so to do. It is true Mr. Levy is entitled to say that the use of the word " equivalent " does indicate that there is not there charged what I may call the true rate of interest, but

(1) 103 L. J. (K. B.) 612.

(2) [1934] 1 K. B. 692.

(3) Ibid. 693.

that the 64*l.* is ascertained by relation to the 50*l.* and the interest charged, and is in that sense equivalent. But to say that it is equivalent is not to tell the borrower that it has been calculated in accordance with the formula required by the Act. It is not an easy calculation for a borrower or for a lender to make to find out what the rate of interest actually is. If the borrower be told it is calculated in accordance with the formula, then he knows that the formula has been duly applied. If he be merely told that it is equivalent to a certain rate of interest, in my opinion he is not told very much and at any rate he is not told what the Statute requires he should be told and what this Court has decided he should be told.

It is because in my opinion this case really is governed by the decision in *Parkfield Trust, Ld.* v. *Curtis* (1) that with every respect to the learned judge, I cannot agree with the view which he expresses in his judgment when he says: "I do not think that the judgments in the Court of Appeal in the case of *Parkfield Trust, Ld.* v. *Curtis* (1) can be taken to mean what is alleged on behalf of the defendant. Every judgment must be read in view of the facts before the Court." As I have said, I think the facts before the Court in the case of *Parkfield Trust, Ld.* v. *Curtis* (1) did lead to the expression of opinion as to the matters which have to be stated in the memorandum as a matter of necessity on a question which arose naturally out of the argument; and in any event there is a decision unanimously given by this Court on the matter here directly to be considered, and it cannot I think be said to have been limited in its application to any special issues in that case.

For these reasons, I think that the learned judge was wrong in not feeling himself bound by *Parkfield Trust, Ld.* v. *Curtis* (1), and this appeal must succeed.

ROMER L.J. I too think that this case is concluded by the decision of this Court in *Parkfield Trust, Ld.* v. *Curtis.* (1) It is said by Mr. Levy that the observations of the members of the Court in that case were mere dicta. I do not take

(1) [1934] 1 K. B. 685.

C. A.
1936

MASON AND WOOD, LD. v. GREENE.

Romer L.J.

that view at all. I think they were part of the actual decision of the Court. The memorandum in that case was in these terms: "I the undersigned William Greenwood Curtis am willing to borrow from you on May 25, 1933, the sum of 500*l.* with interest at the rate of 240*l.* per cent. per annum and upon the terms of a promissory note to be as hereunder." The promissory note was in these terms: "I promise to pay to Parkfield Trust, Ld., or order . . . . the sum of 500*l.* this day advanced to me together with interest at the rate of 240*l.* per cent. per annum. Such sum of 500*l.* to be paid together with interest then due by consecutive monthly instalments of 325*l.* each commencing on the 25th day of June next and the sum of 325*l.* on the 25th day of July 1933." It would appear from that memorandum, prima facie, that the 240*l.* per cent. per annum was a true rate of interest. But if it were a true rate of interest, then when the first instalment of 325*l.* was paid on June 25, 1933, only 100*l.* was then due for interest. Consequently the 325*l.* would be allocated as to 100*l.* to interest and as to 225*l.* principal. The interest due on the remaining principal of 275*l.* up to July 25, 1933, when added to this principal, would come to more than 325*l.*; in point of fact it would come to 330*l.* Consequently the defendant said, and said successfully, that the memorandum did not state the true contract between the parties. Obviously it did not, if 240*l.* was a true rate of interest, because two instalments of 325*l.* could not possibly represent the repayment of 500*l.* with interest then due. On that ground Roche J. dismissed the moneylenders' action, and this Court agreed that he was right in doing so. Then it was said on the part of the plaintiffs: "But if you really read this memorandum carefully you ought to arrive at the conclusion that the 240*l.* per cent. per annum was not a true rate of interest but a rate of interest calculated in accordance with the Schedule to the Act." The answer of this Court was that this contention was not open to the plaintiffs, because there was no reference in the memorandum, as there should be, to the fact that the rate of interest had been calculated in accordance with the First Schedule to the Act. Lord Hanworth said in terms: "If the computation of the rate per cent. of interest be made under the First Schedule, then I think that the note or memorandum, after stating the amount of the instalments to be paid, should explain that they included interest at whatever rate of interest per annum was ascertained from the First Schedule to the Act, and that this rate of interest has been found under that Schedule." That was the decision of this Court, for Slesser L.J. and I took the same view.

For those reasons, and also those given by Slesser L.J., I agree that this appeal should be allowed.

FINLAY J. I agree with the Lords Justices in thinking that this appeal must succeed on the ground that this case is governed by the decision of this Court in *Parkfield Trust, Ld.* v. *Curtis*. (1)

Appeal allowed.

Leave to appeal to the House of Lords was granted on the terms that the plaintiffs, if successful, did not ask for costs of that appeal.

Solicitors: *Philip Goodenday & Co., for Alfred Bieber & Bieber, Liverpool; Lipton & Jefferies.*

(1) [1934] 1 K. B. 685.

H. C. G.

C. A.

1936

April 29; *May* 28.

GEORGE TROLLOPE & SONS *v.* CAPLAN.

Principal and agent—Commission—Mistake in vendor's instructions to agent—Consequent withdrawal by intending purchaser—Right of agents to recover damages.

The plaintiffs, who were estate agents, were instructed by the defendant to find a purchaser for certain property belonging to him, part of which he informed them was let to a tenant at 180*l.* per annum. The plaintiffs found an intending purchaser "subject to contract," but after negotiations had proceeded for some time the defendant informed the plaintiffs that although the lease of the part of the premises referred to stated the rent to be 180*l.*, he had verbally allowed the tenant to pay 145*l.* only, and would decline to go back on this arrangement. On becoming aware of this the intending purchasers declined to proceed unless the purchase price was reduced, and as this was not agreed to by the defendant the transaction went off. On a claim by the plaintiffs to recover commission or damages for breach of contract the county court judge gave judgment in their favour for the full amount they would have earned as commission if the transaction had gone through. On appeal:—

Held, that before an award of damages could be made equal to the commission the plaintiffs would have earned had the transaction gone through, it must be found as a fact that but for the action of the defendant a binding contract with the purchaser would have been entered into; that on the facts of this case this could not be said inasmuch as, except as to the price, none of the terms had been agreed; and therefore that there must be a new trial to ascertain what damage the plaintiffs had actually suffered by being deprived of the chance of earning their commission.

Trollope & Sons v. *Martyn Brothers* [1934] 2 K. B. 436 distinguished.

APPEAL from West London (Brompton) County Court.

The defendant wrote to the plaintiffs, who were estate agents, stating that he wished to sell certain premises at 318 Uxbridge Road, consisting of (inter alia) a shop occupied by a tenant under a lease granted in 1934 at 180*l.* per annum, and the defendant requested them to endeavour to find a purchaser. Thereupon the plaintiffs proceeded to communicate with likely purchasers, and thereafter they wrote to the defendant stating that they had received an offer of 1500*l.* for the property "subject to contract." The defendant declined to accept this offer, but stated that he would be prepared to accept 1750*l.*, whereupon the plaintiffs informed him by letter that Small Properties, Ld., were willing to purchase for that sum. They added in their letter that "it is understood that in the case of the shop and basement a new lease of 3, 7, 14 or 21 years was granted . . . . last year at 180*l.* per annum." On receiving that letter the defendant telephoned stating that there was a mistake in that the rent of the shop should have been given as 145*l.* per annum, whereupon the plaintiffs replied that Small Properties, Ld., would no doubt "require a proportionate reduction as the income was 35*l.* per annum less than had been given to them." It then appeared that although in the lease to the tenant of the shop the rent stated was 180*l.*, the defendant had agreed verbally "to a temporary reduction in the rent for an undefined period and would not wish to take advantage of the strict terms of the lease to effect a sale." In answer to the defendant's letter containing this statement the plaintiffs wrote that Small Properties, Ld., were not prepared to proceed at 1750*l.*, saying that "if the tenant of the shop has been promised a reduction in rent there would no doubt be a lot of unpleasantness with him which they do not want to be bothered with, and he would in all probability give up the premises at the first break in the lease." This offer by Small Properties, Ld., thereupon went off on the ground stated. The plaintiffs then claimed that as the transaction had not gone through owing to the defendant's inaccurate statement as to the rent paid by the tenant of the shop, they were entitled to the commission they would have earned had the sale become effective.

The county court judge, in his judgment, said he was satisfied that the negotiations between the defendant and Small Properties, Ld., ended by the discovery by the latter that the defendant had verbally agreed that his tenant should pay 145*l.* per annum instead of 180*l.*, and his refusal to go back upon his verbal agreement, and that the defendant was therefore unable or unwilling to complete the sale to Small Properties, Ld., at the price agreed. Further, the plaintiffs had carried out everything they undertook to do,

C. A.
1936

George Trollope & Sons v. Caplan.

and every term in the proposed contract had been agreed "subject to contract." The matter had therefore reached a stage when it would normally pass out of the hands of the plaintiffs into the hands of the solicitors to the defendant and Small Properties, Ld. Being "subject to contract" the defendant could up to the moment of executing the contract withdraw from the bargain, and Small Properties, Ld., would have no right of action against him. But the question was whether the defendant could refuse or fail to proceed with the sale to Small Properties, Ld., without remaining liable to the plaintiffs for their commission. The principal could withdraw from the bargain without being liable to the agent for commission provided that the principal had a reasonable excuse for so doing, but in the absence of a reasonable excuse he would be liable to pay the commission which the agent had done everything in his power to earn. In the present case the reason given by the defendant for withdrawing was his verbal agreement with his tenant for a reduction of rent, and his (the defendant's) unwillingness to put an end to that agreement. He remained unwilling or unable to carry out the terms of his provisional contract with Small Properties, Ld. The plaintiffs had thereby been prevented from earning their commission by his default. There would therefore be judgment in the plaintiffs' favour for damages equal to the full amount of the commission they would have earned had the transaction gone through—namely 51*l.* 5*s.*

The defendant appealed.

Arthian Davies (*C. Gallop* with him) for the appellant. The county court judge has held in effect that the mere fact that by reason of the vendor having innocently misdescribed the property to be sold, and the purchaser refusing to go on, the agents are entitled to the commission they would have earned had the transaction gone through. That cannot be right, and it receives no support from the decision upon which the county court judge relied: *Trollope & Sons* v. *Martyn Brothers.* (1) There everything had been agreed

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(1) [1934] 2 K. B. 436.

C. A.
1936

GEORGE TROLLOPE & SONS v. CAPLAN.

between the vendor and intending purchaser, and the latter had in fact signed the engrossment of the contract, but the vendor without just excuse refused to proceed. Here the proposed purchasers refused to go on, and in those circumstances the plaintiffs were certainly not entitled to recover what they would have been entitled to had the sale gone through: *Peacock* v. *Freeman* (1); see also *Grogan* v. *Smith* (2), where it was said that it must appear that the parties had finally agreed to all the terms. Here all the terms had not been agreed.

Edgedale for the respondents. The present case is no doubt different from *Trollope & Sons* v. *Martyn Brothers* (3), but nevertheless the judgment of the county court judge can be supported. The judge found that the transaction went off by reason of the appellant's refusal to go back upon his verbal agreement with his tenant, which agreement had not been disclosed to the respondents or the intending purchasers till the respondents had carried out their work. *Prickett* v. *Badger* (4) decided that where an agent employed for an agreed commission to sell land succeeds in finding a purchaser but the principal declines to sell, the agent is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. See also to the like effect *Fisher* v. *Drewett* (5); *Nosotti* v. *Auerbach* (6); and *Roberts* v. *Barnard*. (7)

Arthian Davies in reply. *Prickett* v. *Badger* (4) was a very different case from this. There the vendor gave instructions to the agents to sell land which was not his. Further, in that case there was not, as in the present case, any question of the offer being "subject to contract." To entitle the agents to recover it is not sufficient for them to say that in all probability there would have been a binding contract: they must show that all the essential terms had been agreed, and that they had done all that they were employed

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(1) (1888) 4 Times L. R. 541.
(2) (1890) 7 Times L. R. 132.
(3) [1934] 2 K. B. 436.
(4) (1856) 1 C. B. (N. S.) 296.
(5) (1878) 39 L. T. 253.
(6) (1899) 15 Times L. R. 140.
(7) (1884) Cab. & E. 336.

C. A.
1936

George Trollope & Sons *v.* Caplan.

to do. The agents in this case have not satisfied these conditions.

Cur. adv. vult.

May 28. The following judgments were read :—

Greer L.J. The appellant, Dr. Caplan, in March, 1935, instructed the respondents, Messrs. Trollope & Sons, to act as his agents in selling certain property, of which he was the leasehold owner, known as 318 Uxbridge Road, Shepherd's Bush. In a letter to the respondents dated March 13, 1935, he described the property as follows : "318 Uxbridge Road, Shepherd's Bush. D.F. shop with rear entrance and side door to upper part. Accom. Large shop and room at rear and basement occupied for past seven years by Ashmore's Opticians. New leases 3–7–14–21 years granted last year at 180*l.* p.a. excl.," and other specified rooms occupied on the other floors. "Lease 99 years from April 1883 i.e. 46 years unexpired at 14 guineas ground rent. Price 2,000*l.* or near offer." On receipt of that letter the respondents set about the work of trying to obtain an offer of 2000*l.* for the property. After arranging for an order to view, the respondents, through Messrs. White, Druce & Brown, obtained an offer of 1500*l.* on behalf of Small Properties, Ld., for whom Messrs. White, Druce & Brown were acting. The offer was 1500*l.* "subject to contract." According to the uncontradicted evidence of Mr. Reckett, who was doing the work for the respondents, on March 28 he had a conversation on the telephone with the appellant when the appellant refused to accept the 1500*l.* offer, and said that if the respondents could get an offer of 1750*l.* he would accept that. Small Properties, Ld., then agreed with Mr. Reckett to increase their offer to 1750*l.* This offer, like the previous offer of 1500*l.*, was by implication an offer "subject to contract." The offer which the appellant had given the respondents authority to accept was an offer of 1750*l.* as the price for property of which the most valuable part, the ground floor and basement, was producing a rent of 180*l.* per annum. Early on the morning of March 29 Mr. Reckett made a note of a telephone conversation in which the appellant said the rent should have been given as 145*l.* per annum and not 180*l.* per annum. The memorandum is as follows: "318 Uxbridge Road. Dr. Caplan telephoned on receipt of our letter of 28th instant to say we had made a mistake in his instructions and that the rent of the shop should have been given as 145*l.* per annum as was stated in his letter of the 13th instant. I replied so far as I could recollect this was not the case and that I would have the letter turned up, but meanwhile that I would speak to the purchasers' agents and see what they were prepared to do. I told them (? him) that no doubt they would require a proportionate reduction as the income was 35*l.* per annum less than had been given to them. Dr. Caplan does not seem inclined to make any reduction." Later on the same day the respondents wrote to the appellant the letter of March 29, which reads as follows: "318 Uxbridge Road, Shepherd's Bush. Since you informed us on the telephone this morning that we had made an error in the particulars of the above which you gave us in your letter of 13th inst. we have referred to this letter and find that the rent of the shop and basement is distinctly stated at 180*l.* per annum exclusive and no mention whatever made of there having been a reduction to 145*l.* We have spoken to the purchasers' valuers, and as we anticipated, their clients are not prepared to proceed at the agreed price of 1750*l.* in view of the fact that the income is 35*l.* per annum less than they were informed, unless a proportionate reduction which they compute at about 375*l.* is made. We shall be glad to hear what you wish us to do in the matter and would mention we consider that in any event we should be entitled to our remuneration." On the next day, March 30, the appellant wrote to the respondents a letter which reads as follows: "I regret I am unable to accept the figure offered by your clients for the above property. I regret also if I omitted to mention that this rent was 145*l.* and not 180*l.* as given in the lease although I presume I mentioned to you on the phone if not in my letter. The terms given in the lease are of course binding on the tenant but I agreed verbally to a temporary reduction in the rent for an undefined period and would not wish to take advantage of the strict terms of the lease to effect a sale. If your clients care to proceed under these circumstances the matter can go ahead." It seems clear from this that the appellant, though he still wanted to sell the property, withdrew the authority which he had given to the respondents to sell the property in question as a property earning as to part 180*l.* per annum. On April 2 the respondents wrote the letter which reads as follows: "We regret to say that under the altered conditions [the proposing purchasers] are not prepared to proceed at 1750*l.* They say that if the tenant of the shop has been promised a reduction in rent there would no doubt be a lot of unpleasantness with him which they do not want to be bothered with and he would in all probability give up the premises at the first break in the lease. The only particulars you gave us regarding the tenancies were contained in your letter of 13th ultimo where, as we mentioned before, the rent for the shop was stated to be 180*l.*" It is clear that the appellant by refusing to allow the transaction to go through except on the basis that the rent to the tenant should be reduced to 145*l.* per annum, deprived the respondents of the chance that the work they had done would result in the sale of the property at the agreed figure of 1750*l.* I think that at this time the respondents had done all the work which is expected from an agent, though their work, having regard to the offer being "subject to contract," might not have resulted in a sale which would have entitled them to their commission. In my judgment this was a breach of an implied term in the contract under which the respondents were employed to obtain a purchaser of the property at the agreed price on terms which would be agreed between the appellant and the proposed purchaser. The respondents had done all the work which an agent for the sale of property instructed to find a purchaser had to do, though their commission would only become payable if the work that they had done should ultimately result in a concluded agreement between vendor and purchaser. Though the contract would not prevent the appellant from trying to obtain a purchaser himself either through other agents, or directly, still, as long as the property was in the market for sale the respondents ought not to have had taken from them the chance of their services resulting in an agreement between vendor and purchaser which would have entitled them to commission. To use the words of Maugham L.J. in *Trollope & Sons* v. *Martyn Brothers* (1) the appellant "was not at liberty to prevent the commission being earned." In that case all the relevant cases were discussed in my own judgment and in the judgment of Maugham L.J. I do not think it would serve any useful purpose to go through them again. I think it is established by *Prickett* v. *Badger* (2); *Fisher* v. *Drewett* (3); and *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (4) that such a term ought to be implied in the contract between the instructing principal and an agent employed to obtain a purchaser, and that such prevention will give rise to a right of action for damages for breach of the agency contract even though there are still many terms of the contract between vendor and purchaser to be agreed to before the commission, qua commission, would become due to the agent.

In *Prickett* v. *Badger* (2) the agent, acting on the instructions of the defendant, had obtained an offer of 700*l.* per acre for some freehold land in Seven Sisters Road, Holloway, Middlesex, which was 50*l.* more than the price at which he had been authorized to sell. It was held that the agent was entitled to recover on a quantum meruit for the services rendered. By the judgment of a very strong Court the agent was held to be entitled to recover 50*l.*, the amount of the jury's verdict, as a quantum meruit. In giving judgment Williams J. said (5): "I think there was evidence which was fit for the consideration of the jury, that the defendant employed the plaintiff to sell the land, upon the terms, that, if he found a purchaser at the price named, he was to receive a commission of 1½ per cent.; and that the plaintiff bestowed his labour in endeavouring to find, and did find, a purchaser at that price; but that

(1) [1934] 2 K. B. 459.
(2) 1 C. B. (N. S.) 296.
(3) 39 L. T. 253.
(4) (1864) 17 C. B. (N. S.) 733.
(5) 1 C. B. (N. S.) 304.

C. A.
1936

GEORGE TROLLOPE & SONS
v.
CAPLAN.

Greer L.J.

the negotiation failed because the defendant was not prepared to come forward as vendor; and that so the plaintiff was prevented from earning the stipulated commission." It is clear that in that case, as in the present case, the commission was not earned because as between vendor and purchaser terms in addition to the price would have had to be settled between vendor and purchaser before the commission would become due, but the plaintiff having done all the agency work the defendant was held liable. Crowder J. in the course of his judgment adopts the following statement of the law contained in the notes of the learned editor on the case of *Cutter* v. *Powell* in 2 Smith's Leading Cases at p. 16: "It is an invariably true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to treat it as rescinded, and may, on doing so, *immediately* sue on a quantum meruit for anything which he had done under it before the rescission." This of course can only be on the ground that the act of the defendant is a repudiation of an essential term in the contract between him and the agent. And in the conclusion of his judgment Crowder J. says this (1): "I agree with my brother Williams that the ordinary rule as to employing an agent to let or to sell for a certain commission, where the authority is revoked before anything has been done under it, does not apply to the present case." This means, in the opinion of the learned judge, that if services had been rendered by the agent before the authority is revoked, then the agent could recover either damages or a quantum meruit for work done. Willes J. agreed with the other two judges, saying in the course of his judgment (2): "In pursuance of the retainer, he proceeded to find a purchaser for the land; and it was only the defendant's disinclination or inability to proceed that prevented the sale being completed." Later in his judgment he says: "I must confess I do not see why the jury should not have given him the full amount."

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(1) 1 C. B. (N. S.) 307.

(2) Ibid. 307.

Fisher v. *Drewett* (1) was an action by an agent for commission for procuring a loan on mortgage. The commission note was in these terms: "Dear Sir, In the event of your procuring me the sum of 2000*l*., or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff went to various solicitors' offices attempting to procure the loan, and ultimately entered into an arrangement with the Temperance Building Society, who agreed to advance such a sum as their surveyor should certify. The survey was made, and the sum certified was 1625*l*. The society thereupon offered to advance that sum to the defendant, subject to his title to the property being satisfactory, and he wrote to their secretary accepting the society's offer. Subsequently when the title was being investigated by the society's solicitors, the defendant refused, on the ground of expense, to furnish a further abstract of title, and consequently the loan was never made. Though the various terms applicable to the mortgage had not been finally agreed, the Court held that the plaintiff was entitled to the amount of his commission. Thesiger L.J. in giving his judgment said: "It was the defendant's fault that the loan was not completed, and he would have been liable to an action for not carrying out his agreement." I understand that the learned Lord Justice meant that the defendant would have been liable to an action by the plaintiff for not carrying out his agreement with the plaintiff.

In *Inchbald* v. *Western Neilgherry Coffee, etc., Co.* (2) the material facts of the case are stated by me in my judgment in *Trollope & Sons* v. *Martyn Brothers* (3) in the following words: "The contract there was to pay to the plaintiff, who was employed as a stockbroker in and about the selling and disposing of the shares of the company, the sum of 100*l*. down and 400*l*. in addition on the allotment of the whole of the shares of the company. The defendants, who had prevented, by winding up the company, the allotment of the whole of the shares, were held liable for damages because

(1) 39 L. T. 253.
(2) 17 C. B. (N. S.) 733.
(3) [1934] 2 K. B. 436, 448.

C. A.
1936

George Trollope & Sons v. Caplan.

Greer L.J.

by causing the winding up they had prevented the allotment, and the damages were fixed at 250*l*." In the course of his judgment Willes J. said (1): "I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it." This observation is, perhaps, too widely stated, but in so far as it states an obligation not to do any act which prevents the person entitled to receive the money from receiving it, it accords with the law as laid down in other cases—such, for example, as *Fisher* v. *Drewett* (2). In the case we are considering I think it was established that the defendant had broken his contract with the plaintiff. But it does not follow that the damage recoverable is the amount of the commission or that it is only nominal.

The learned county court judge who tried this case gave judgment on the alternative claim made by the respondents for damages for breach of contract, and he awarded as such damages the full amount of the commission. In order to succeed in recovering anything more than nominal damages the respondents would have had to prove not merely that the appellant had broken an implied term of the contract of employment, but they would have had to establish by sufficient evidence that by reason of the appellant's wrongful withdrawal of their authority to sell on the basis that the tenant's rent was 180*l*. they had lost the amount of their commission. This means that there would have had to be evidence making it highly probable that if the appellant had allowed the transaction to go on all the terms would have been agreed and a contract would have been entered into between the appellant and the proposed purchasers at the agreed price. The only evidence on that question is that which was given by Mr. L. J. Ellis, the secretary of the proposed purchasers, Small Properties, Ld., who said that his company would certainly have completed on any reasonable terms. The learned judge never directed his mind to the question whether

(1) 17 C. B. (N. S.) 741.

(2) 39 L. T. 253.

the loss of the commission was caused by the appellant's wrongful withdrawal of the respondents' authority. He did not consider the risk that there was that the appellant and the proposed purchasers might never have come to an agreement with regard to the several matters that would have to be settled before there could be a concluded contract as between the vendor and the purchaser, including especially the date of completion, nor did he consider the risk of any disagreements that might have arisen between the time when the price was agreed and when the purchase would be concluded by the signing of a contract between vendor and purchaser. I think the learned judge was wrong in law in not considering the question whether the appellant's breach of contract caused the loss of the commission, and there must be a new trial ordered on that ground. I note that the plaintiffs did not base their claim on the right to charge a quantum meruit for their time and labour, and I therefore exclude such a claim from my consideration.

As the appellant has had to come to this Court to get the relief to which he is entitled by an order for a new trial, he ought to have the costs of the appeal; the costs of the first trial to abide the event of the new trial. There should also be liberty to apply in case the respondents should not set down the case in the county court for re-trial.

Greene L.J. The plaintiffs are house agents and in this action they put forward two alternative claims, one for commission alleged to have been earned, the other for damages for breach of an implied term in the agency agreement with the defendant by wrongfully preventing the plaintiffs from earning their commission. The learned county court judge gave judgment for the plaintiffs on the latter claim, and it is upon that claim alone that the question in this appeal arises. The former claim was one which on the facts admittedly could not be supported, since it was not suggested before us that under the contract to be inferred between the parties the plaintiffs would have been entitled to commission at any stage before a contract for the sale had been actually made.

C. A.
1936

GEORGE TROLLOPE & SONS v. CAPLAN.

Greene L.J.

In order to explain the nature of the question it is necessary to state the facts with some particularity. The defendant was the owner of leasehold premises 318 Uxbridge Road, Shepherd's Bush, held on a lease for 99 years from April, 1883. Part of these premises was sublet by a sub-lease granted in 1934 for a term of 3, 7, 14, or 21 years at tenant's option. The rent reserved by the sub-lease was 180*l.* In March, 1935, the defendant placed this property in the hands of the plaintiffs for sale by private treaty. He gave them the particulars above mentioned, together with others not material to be stated, in a letter of March 13, 1935, in which he said that his price was 2000*l.* or near offer. Apart from the price the defendant did not inform the plaintiffs as to the terms which he would be willing to accept in respect of title, date of completion and other matters which would require to be agreed with a purchaser before a binding contract could be effected. No express agreement was made as to the terms upon which the plaintiffs were to act on behalf of the defendant in the matter.

The plaintiffs found a company named Small Properties, Ld., which was willing to negotiate for the purchase of the property described, and on March 27, 1935, they communicated to the defendant an offer by this company of 1500*l.* "subject to contract." This offer was refused by the defendant on March 28, but he instructed the plaintiffs that if the company would increase its offer to 1750*l.* he would close with them. The plaintiffs communicated with the company which did increase its offer to 1750*l.* and the defendant was so informed by letter from the plaintiffs of March 28. It is agreed that this increased offer was also "subject to contract." This means that at this stage neither the defendant nor the company was bound. The offer and its acceptance amounted to nothing more than an intimation by the parties of their willingness to enter into a contract at the price stated provided both should remain willing to continue the negotiations and provided they could agree on the other terms to be inserted in a written contract. The position therefore at this stage was that the plaintiffs had only taken the first step towards earning their commission. No binding contract had been made, none of the terms of the proposed contract had been settled except the price, and both the vendor and the purchasers were entitled at any moment and for any reason, good or bad, to decline to go on with the negotiations. Incidentally it is to be observed that at the time when the negotiations were broken off the purchasers had not even examined the lease. It is true that the plaintiffs had carried the matter to a point where it was ready to be put into the hands of the solicitors for the parties. But it was not possible for the plaintiffs to say that they had procured a purchaser ready and willing to purchase on the defendant's terms, since, apart from the price, no such terms had been stated and accordingly the company cannot be said to have agreed to them.

At this stage in the negotiations an important event happened. The defendant on March 29 telephoned to the plaintiffs informing them that " they had made a mistake in his instructions and that the rent (i.e. the rent payable by the sub-lessee) should have been given as 145*l.* per annum." On receipt of this information (which was in fact unknown to them before) the plaintiffs communicated with the company's valuers, who stated that their clients were " not prepared to proceed at the agreed price of 1750*l.* in view of the fact that the income is 35*l.* less than they were informed unless a proportionate reduction which they compute about 375*l.* is made." This decision was communicated to the defendant by the plaintiffs by letter of March 29, and on March 30 the defendant replied. [The Lord Justice read the letters of March 30 and April 2 already set out, and continued :] The negotiations then came to an end.

The arrangement between the defendant and his sub-tenant was in fact not a binding one in law. It was merely an indulgence granted voluntarily by the defendant which could have been discontinued at any time and did not affect the sub-tenant's legal liability to pay the full rent of 180*l.*

The learned county court judge awarded to the plaintiffs as damages a sum equal to the commission which they would have earned if the contract had been actually made. His decision appears to be based on two findings which I will state in their logical order although that is not the order in which they appear in the note of his judgment. (1.) He finds that "every term of the proposed contract between the defendant and the proposed purchaser Small Properties, Ld., had been agreed upon 'subject to contract.'" He holds (2.) that the negotiations came to an end because of "the discovery by the intending purchaser that the defendant had verbally agreed that his tenant under the sub-lease should pay 145*l.* per annum instead of 180*l.* and his refusal to go back upon his verbal agreement." I will deal with the second of these findings first. I cannot myself read the defendant's letter of March 30 in any sense other than as a refusal to proceed with the negotiations except upon the footing that the purchasers would accept towards the sub-tenant at least the same moral obligation as the defendant conceived himself to be under in respect of the reduction of the rent. I doubt whether it goes further than this. If the defendant in this letter was asking the purchasers to enter into a legal obligation towards the sub-tenant to agree to a reduced rent he would have been asking the purchasers to place the sub-tenant in a better position than he was then, since the reduction which he was enjoying was a mere matter of indulgence. The purchasers themselves do not appear to have construed the defendant's proposal as specifically asking them to enter into an obligation, legal or moral, towards the sub-tenant. Their objection was that the existence of the understanding between the defendant and the sub-tenant placed them in the dilemma either of having to accept a reduced rent, or, if they insisted on the full rent (which they apparently conceived they would be entitled to do if they completed) of having a dissatisfied tenant who would in all probability determine his tenancy at the earliest possible moment. That this was their understanding of the defendant's proposal appears, I think, from the correspondence (particularly the letter of April 2) and from the evidence of Mr. Ellis, the purchasers' secretary, who said: "Our reason for not completing was that we like to have satisfied tenants. The tenant would have been most dissatisfied. We did not want to buy trouble."

It was argued that the defendant was not asking the purchasers to enter into any sort of obligation and that he was willing that the purchase should go through on the basis that the purchasers might, if they chose, exact the full rent; and that the real reason why the negotiations were broken off was that although the purchasers would have had a legal right to exact the full rent unfettered by any obligation, legal or moral, it was they who refused to proceed because they were afraid of trouble with the sub-tenant. Some colour is lent to this argument by the evidence of Mr. Ellis which I have quoted. But even if the purchasers misunderstood the vendor's requirement I think on the whole that that requirement was the effective cause of the termination of the negotiations and that the learned county court judge was right in the second of his findings set out above, subject only to this, that if by the expression "verbally agreed" he means that there was a legal binding agreement he was admittedly mistaken, a circumstance which, however, would not affect the substantial correctness of his finding upon the material point.

But this is not in my opinion sufficient to entitle the plaintiffs to recover as damages an amount equal to the commission. It is, I think, clear from the learned judge's note of his judgment that the first finding was in his opinion essential to his decision. Indeed, the finding is so worded as to bring the case within the principle of the decision of this Court in *Trollope & Sons* v. *Martyn Brothers* (1), which was cited to him. This finding cannot in my opinion be supported, since there is no evidence whatever that any terms had been agreed other than the price. In order to support a claim for damages equal to the commission it was in my judgment necessary for the plaintiffs to establish at least that but for the action of the defendant in refusing to proceed except upon the basis mentioned in his letter of March 30 a binding contract would

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(1) [1934] 2 K. B. 436.

C. A.
1936

George Trollope & Sons v. Caplan.

Greene L.J.

are the more difficult it will be for the agents to establish their claim for damages equal to the commission; but even if the negotiations have only reached the stage of agreement upon one term there may yet be special circumstances in the case sufficient to justify a tribunal of fact in drawing the inference that but for the vendor's action the parties would have made a contract. It is for the tribunal of fact to weigh all the circumstances; in particular, the terms which have been agreed, those which still remain to be agreed, the possibility of the parties failing to agree upon these latter terms, the possibility of the purchaser withdrawing for any reason, good or bad, and (in the present case) the fact that the purchasers had not inspected the lease.

Having regard to what I have said as to the importance attached by the learned county court judge to the fact that the plaintiffs had done all that they could do it is right that I should add a few observations upon a passage in the judgment of Greer L.J. in *Trollope & Sons* v. *Martyn Brothers* (1) on which the view of the learned county court judge appears to be based. Greer L.J. said this (2): " But as between the plaintiffs and the defendants, the latter could not after the plaintiffs' work was complete deprive them of the fruits of their work by withdrawing their consent to the signing of the contract and the completion of the sale "; a similar passage occurs on p. 452. In the passage which I have quoted Greer L.J. clearly treats as an essential fact to be found before the plaintiffs could be awarded the damages which they claimed that the defendants' action had deprived the plaintiffs of the fruits of their work. Now this fact had been found by the learned trial judge and it is in relation to that finding (which was accepted by the Court) that the passage quoted must be read. The reference to the circumstance that the plaintiffs had completed their work does not, as I read the passage, mean that it was this circumstance that entitled the plaintiffs to recover the damages awarded; it was the deprivation operating on that circumstance which was the crucial matter. In other words, the plaintiffs would

(1) [1934] 2 K. B. 436.

(2) Ibid. 451.

not have been entitled to the damages awarded unless they could show (1.) (as on the facts of that case and on the true construction of the agreement under which the plaintiffs were employed they did show) that they had completed their work and (2.) that it was the defendants' withdrawal that prevented the matter being completed by a contract. Upon the facts of the present case the plaintiffs had, in my judgment, completed their work in the sense of that expression as used by Greer L.J. But as I have already pointed out, before they can recover damages equal to the commission it must be proved as a fact that the defendant's action deprived the plaintiffs of the fruits of that work, a thing which is not proved merely by saying that the defendant arbitrarily withdrew.

If all the plaintiffs in the present case could show was that the defendant had wrongfully deprived them of the chance of earning their commission as distinct from preventing them from earning commission which, but for the defendant's action, they would have earned, some damages could, I think, be awarded, since it appears to me on the authorities that the implied undertaking in contracts of this nature covers the case where the principal without just excuse does something which deprives the agents of the chance of earning the commission, at any rate where the agents have rendered services under their contract with the principal. But the measure of damages to be awarded in such a case must depend on the value of the chance of earning the commission, and that value may be great or small or nominal according to the circumstances.

In conclusion I may perhaps be allowed to say that in my judgment the authorities as to the rights and obligations of house agents and their clients with regard to such questions as the present one are not in a very satisfactory condition, and to express the hope that one day the whole position may be reviewed by the House of Lords.

In the result I agree with the order proposed by Greer L.J.

TALBOT J. I think that in this case the county court judge must be taken to have found that (1.) the purchase went off because the defendant refused to proceed with it unless Small Properties, Ld., would pay a price of 1750*l.*; (2.) Small Properties, Ld., had provisionally agreed to pay 1750*l.* on the footing that the occupying tenant of the premises was bound to pay, and was paying, 180*l.* rent; (3.) before March 29, 1935, Small Properties, Ld., knew nothing of any understanding between the defendant and the said tenant that the rent paid was to be 145*l.*; (4.) before the same day the defendant had not informed the plaintiffs of any arrangement (legally binding or not) for any rent except 180*l.*

Small Properties, Ld., would not give 1750*l.* unless they could expect to receive 180*l.* rent from the sitting tenant for the rest of his term without question or complaint. The defendant would not accept less than 1750*l.*, though that price had been proposed to, and provisionally agreed by, Small Properties, Ld., without any knowledge of an arrangement between the defendant and his tenant that the rent paid would for a time be substantially less than the sum (180*l.*) mentioned in the lease. In other words, the defendant put an end to the negotiations by introducing a new term, never disclosed to Small Properties, Ld., when they provisionally agreed to pay 1750*l.* When it turned out that the defendant would sell only if Small Properties, Ld., would undertake not to require the tenant to pay more than 145*l.*, Small Properties, Ld., naturally and reasonably required a proportionate reduction in the price. By refusing this the defendant destroyed any chance that the transaction might go through. In my opinion the plaintiffs are in these circumstances entitled to recover damages (certainly not necessarily nominal) for breach of contract by the defendant in so altering his instructions to them by the introduction of a new term to which it was unreasonable to expect the party, with whom negotiation had proceeded to a promising point, to agree, and thereby making it impossible for the plaintiffs to earn their commission. *Nosotti* v. *Auerbach* (1) in my opinion helps the plaintiffs on the effect of the introduction by a

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(1) 15 Times L. R. 140.

C. A.
1936

GEORGE TROLLOPE & SONS
v.
CAPLAN.

vendor of a new term in a case of this kind: see per Maugham L.J. in *Trollope & Sons* v. *Martyn Brothers*. (1) I agree with the order proposed.

Appeal allowed. Order for new trial.

Solicitors for appellant: *Forsyte, Kerman & Phillips.*

Solicitors for respondents: *Trollope, Winckworth, Crump & Sprott.*

J. S. H.

CRAVEN-ELLIS *v.* CANONS, LIMITED.

[1934. C. 1363.]

C. A.
1936
May 26, 27, 28;
July 6.

Company—Director—Agreement to act in development of estate—Omission to acquire qualification shares—Right to sue on quantum meruit for services rendered—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 141, 143.

The plaintiff was appointed managing director of a company by an agreement under the company's seal which also provided for his remuneration. By the articles of association of the company each director was required to obtain his qualification shares within two months after his appointment. Neither the plaintiff nor the other directors obtained their qualification shares within two months or at all. The plaintiff having done work for the company claimed to recover the remuneration provided for in the agreement, or, alternatively, on the basis of a quantum meruit:—

Held, that the fact that the plaintiff did the work under an agreement which was in fact void did not disentitle him from recovering on a quantum meruit.

Dictum in *In re Allison, Johnson & Foster, Ld.; Ex parte Birkenshaw* [1904] 2 K. B. 327, 330, questioned.

Per Greer L.J.: The obligation to pay reasonable remuneration for work done when there is no binding contract between the parties is imposed by a rule of law and not by an inference of fact from acceptance of the services.

Decision of Goddard J. reversed.

Appeal from Goddard J.

The plaintiff, who was a valuer and estate agent, claimed to recover from the defendant company in respect of work done by him on their behalf. In 1927, Sir Arthur du Cros and his son, being interested in the development of Canons Estate, which became vested in Pard Estates, Ld., were in communication with the plaintiff on the subject, and he in letters written to Sir Arthur du Cros and Mr. Phillip du Cros stated the terms on which he was willing to act in connection with the development of the estate. Terms were eventually agreed and the engagement was to be for three years. On August 15, 1928, the defendant company was formed to purchase the Canons Park Estate from Pard Estates, Ld., and the plaintiff continued to do work for the defendant company, of which he became a director. Under the articles of the defendant company the directors could act without qualification for two months, but after that time they became incapable of acting, as none of them in fact acquired the necessary qualification. In April, 1931, an agreement was executed under the seal of the defendant company setting out the terms on which the plaintiff was to act as managing director of the company, its seal being affixed by resolution of the unqualified directors. The plaintiff now sought to recover for work done and services rendered under and in pursuance of that agreement, and, alternatively, the same sum on a quantum meruit.

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(1) [1934] 2 K. B. 436, 461, 462.

By their defence the defendant company said that the written agreement relied upon by the plaintiff was made in purported confirmation of his appointment as managing director of the company upon the terms and conditions therein contained, including an undertaking by him to place at the company's disposal his expert skill as a land and estate agent. By reason of his appointment as managing director the defendant company said that it was the plaintiff's duty to acquire the share qualification required by the company's articles ; that he never acquired the requisite share qualification ; that the acts and matters in respect of which payment was claimed were illegal, being in breach of the provisions of s. 73 of the Companies Act, 1908, and s. 141 of the Companies Act, 1929, and therefore that the plaintiff's claim was unenforceable in law.

In his reply the plaintiff relied upon article 18 of the defendant company's articles of association, by which it was provided that the office of a director should be vacated if he ceased to hold his qualification but that any act done in good faith by a director whose office was vacated should be valid unless prior to the doing of such act written notice should have been served upon the director or an entry made in the minute book that such director had ceased to be a director of the company; and that no such notice was served upon him or any entry made in the directors' minute book stating that the plaintiff had ceased to be a director. The plaintiff contended that the defendant company having, with full knowledge of the facts, taken the benefit of his services were precluded and estopped from disputing liability to pay for the same.

Goddard J. in his judgment said that the plaintiff never was a director at all, and although he might be liable to a penalty it was contended on his behalf that the statute did not debar him from acting as a director. In his Lordship's view all the authorities were against that construction. It was then said that in any event the plaintiff was entitled to recover on a quantum meruit; but in his Lordship's opinion such a cause of action depended on an implied request, and an express request negatived an implied request. He held therefore that the plaintiff's claim failed.

The plaintiff appealed.

Pritt K.C. and *Valentine Holmes* for the appellant. The agreement sued on was not a nullity. The work done for which remuneration is claimed was not done by the appellant qua director but as a valuer. Even, however, if it can be said that the appellant was acting as a director his acts are validated by s. 143 of the Companies Act, 1929. It cannot be said that the contract itself was illegal. In any view the claim based on a quantum meruit is clearly maintainable. In *Scarisbrick* v. *Parkinson* (1) the plaintiff, who had served the defendant as clerk, was held entitled to recover on a quantum meruit although the agreement was unenforceable

(1) (1869) 20 L. T. 175.

by reason of the Statute of Frauds, and the agreement was looked at to enable the Court to assess the amount payable. In *In re Allison, Johnson & Foster, Ld.*; *Ex parte Birkenshaw* (1) it was said by the Divisional Court that " there can be no implied contract for payment arising out of acceptance of the work done where the work was done upon an express request which turns out to be no request at all, but which down to the time when the whole of the work had been done was supposed by both parties to be valid and operative." That statement, it is submitted, is not sound in law, and as it is not binding on this Court it should not be followed. Here the company has had the benefit of the appellant's services and should therefore pay for them.

Croom-Johnson K.C. and *R. A. Willes* for the respondents. Sect. 141, sub-s. 5, imposes a penalty upon an unqualified person acting as a director of a company, and therefore the Court will not, directly or indirectly, give effect to the contract sued upon, which is contrary to law. The appellant must be taken to have known that he had no shares in the company, and in those circumstances he is precluded from recovering. In Buckley on Companies, 11th ed., p. 304, in reference to s. 143 of the Act of 1929, which provides that " the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification," the learned editor's comment is expressed thus: " Endangering accuracy for the sake of brevity, it may be said that the effect of this section is that, as between the company and persons having no notice to the contrary, directors, etc., *de facto* are as good as directors, etc. *de jure*." The appellant cannot, however, claim the benefit of this section. It is then said on his behalf that the Court should hold that he is entitled to be paid on a quantum meruit for work actually done. The decision in *Scarisbrick* v. *Parkinson* (2), on which reliance is placed for the appellant, is no authority for the proposition contended for. The real point there was as to the admissibility of the terms of the verbal agreement. Moreover, it was wrongly decided: see *Britain* v. *Rossiter* (3),

(1) [1904] 2 K. B. 327, 330.
(2) 20 L. T. 175.
(3) (1879) 11 Q. B. D. 123.

where Brett L.J. said (1): "It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing." *In re Allison, Johnson & Foster, Ld.*; *Ex parte Birkenshaw* (2) supports the respondents' contention. It was there said (3): "In this case there was no resolution of the company at the so-called meeting of January 28 fixing Mr. Birkenshaw's remuneration as liquidator, and, if there had been, it would have been invalid; and we are at a loss to see how the Court can be asked to award him remuneration out of the funds of the company in liquidation for work done, whether by himself personally or under his direction by his clerks or partners, in a capacity in which he was never validly authorised by the company to act." Then follows the proposition quoted by Mr. Pritt, which, we say, is correct in law and should be followed. In *Woolf* v. *East Nigel Gold Mining Co.* (4) it was decided that where the appointment of a person as director was invalid there could be no action by him for fees or upon a quantum meruit for services rendered. Where that which is done is an offence, i.e. criminal, there is no room for a quantum meruit.

Valentine Holmes in reply. There is no rule of law precluding recovery on a quantum meruit where a person does work for another thinking he is doing it under an express contract but is mistaken in so thinking. If the services are in fact rendered and accepted he is entitled to be paid for them.

Cur. adv. vult.

July 6. The following judgments were read:—

GREER L.J. In the year 1927 Sir Arthur du Cros and his son Phillip became interested in the development of a building estate known as Canons Estate. They desired to have the benefit of the plaintiff's skill and experience as an estate agent in the development of the estate. For a time the estate was vested in a company called the Pard Estates, Ld. On November 11, 1927, the plaintiff wrote to Mr. Phillip du Cros, and on November 29 to Sir Arthur du Cros, stating the terms on which he would be willing to give them the benefit of his skill and experience. On November 30 the plaintiff wrote to Sir Arthur du Cros stating revised terms on which his firm would act as managers of the Canons Park Estate. Subject to some modification to which the plaintiff agreed, Sir Arthur du Cros agreed to these terms on behalf of the Pard Estates, Ld., the engagement to be for three years. On August 15, 1928, Canons Ld. was formed to purchase from the Pard Estates, Ld., the Canons Park Estate. It then became impossible for the plaintiff to go on working for the Pard Estates, Ld., as that company had sold the property, but the plaintiff continued to do the same work for the new company. This company for the time being did not make any contract to employ the plaintiff or his firm on the terms formerly arranged, but without any express agreement they received and accepted the services he was rendering. The signatories to the memorandum and articles, being entitled to elect the first directors, nominated Mr. Phillip du Cros, the plaintiff, and Mr. A. W. Wheeler as the first directors on August 15, 1928, and on August 23 the directors co-opted Sir Arthur du Cros as a director. Under the articles these directors could act without qualification for two months, but after that time they became incapable of acting as directors as none of them had acquired the necessary qualification. The only issued shares of the company were in the two signatories to the memorandum, but there is little room for doubt that these gentlemen were nominees of the du Cros'. Be this as it may, it is clear that on the expiration of the two months, the directors having no qualification ceased to be directors, and were unable to bind the company except as de facto directors by agreements with outsiders or with shareholders. But all the directors must be taken to have known the facts. They became liable to penalties for acting as directors under the provisions of s. 73 of the Companies Act, 1908, then in force. On April 14, 1931, an agreement was executed under the seal of the company, purporting to be between the company and the plaintiff, stating the terms on which he was to act as managing director of the company. The seal was so affixed by resolution of the unqualified directors. The plaintiff in this action sought to recover from the defendant company the remuneration set out in the agreement, and as an alternative, sought to recover for his services on a quantum meruit. Until the company purported to put an end to his engagement he continued to perform all the services mentioned in the agreement.

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(1) 11 Q. B. D. 127.
(2) [1904] 2 K. B. 327.
(3) Ibid. 330.
(4) (1905) 21 Times L. R. 660.

The company, having had the full benefit of these services, decline to pay either under the agreement or on the basis of a quantum meruit. Their defence to the action is a purely technical defence, and if it succeeds the Messrs. du Cros as the principal shareholders in the company, and the company, would be in the position of having received and accepted valuable services and refusing, for purely technical reasons, to pay for them.

As regards the services rendered between December 31, 1930, and April 14, 1931, there is, in my judgment, no defence to the claim. These services were rendered by the plaintiff not as managing director or as a director, but as an estate agent, and there was no contract in existence which could present any obstacle to a claim based on a quantum meruit for services rendered and accepted.

As regards the plaintiff's services after the date of the contract, I think the plaintiff is also entitled to succeed. The contract, having been made by directors who had no authority to make it with one of themselves who had notice of their want of authority, was not binding on either party. It was, in fact, a nullity, and presents no obstacle to the implied promise to pay on a quantum meruit basis which arises from the performance of the services and the implied acceptance of the same by the company.

C. A.
1936
CRAVEN-ELLIS v. CANONS, LD.
Greer L.J.

It was contended by Mr. Croom-Johnson on behalf of the respondents that, inasmuch as the services relied on were purported to be done by the plaintiff under what he and the directors thought was a binding contract, there could be no legal obligation on the defendants on a quantum meruit claim. The only one of the numerous authorities cited by Mr. Croom-Johnson that appears to support his contention is the judgment of a Divisional Court in *In re Allison, Johnson & Foster, Ld.*; *Ex parte Birkenshaw.* (1) The Court consisted of Lord Alverstone, Wills and Kennedy JJ., and the judgment was delivered by Kennedy J. In giving judgment that learned judge, expressing not merely his own opinion, but that of the other two judges, said (2): "There can be no implied contract for payment arising out of acceptance of the work done where the work was done upon an express request which turns out to be no request at all, but which down to the time when the whole of the work had been done was supposed by both parties to be valid and operative." This passage appears to involve the proposition that in all cases where parties suppose there is an agreement in existence and one of them has performed services, or delivered goods in pursuance of the supposititious agreement there cannot be any inference of any promise by the person accepting the services or the goods to pay on the basis of a quantum meruit. This would certainly be strictly logical if the inference of a promise to pay on a quantum meruit basis were an inference of fact based on the acceptance of the services or of the goods delivered under what was supposed to be an existing contract; but in my judgment the inference is not one of fact, but is an inference which a rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact.

In *Prickett* v. *Badger* (3) the question whether an obligation to pay on a quantum meruit basis depended upon an inference of fact from the conduct of the parties was negatived, and

(1) [1904] 2 K. B. 327. (2) Ibid. 330.
(3) (1856) 1 C. B. (N. S.) 296.

such inference was stated to be one that the law imposed on the person accepting the services. In that case the services of the agent had been performed in accordance with an express contract which entitled him to 1½ per cent., and it was impossible to infer from the evidence that by accepting those services the defendant had by conduct promised to pay for them on the basis of a quantum meruit; but it was held that the contract to pay what was reasonable was a contract implied by the law, and not a question of fact to be determined by a jury. In the course of the argument Crowder J. said (1): "All the work done here was done under the special contract"; but the Court held that, notwithstanding that the work was so done and accepted, there was as a matter of law an implied contract to pay a reasonable price therefor. In giving judgment, both Williams J. and Crowder J. speak of the obligation to pay as founded on a promise implied by law. The decisions in *Clarke* v. *Cuckfield Union* (2) and *Lawford* v. *Billericay Rural District Council* (3) are also authorities to the effect that the implied obligation to pay is an obligation imposed by law and not an inference of fact, arising from the performance and acceptance of services. In the last mentioned case the work in respect of which the plaintiff sued was done in pursuance of express instructions given by the defendant council, but the contract purported to be so made was not binding on the defendants because no agreement had been executed under their seal. It was impossible to say as a matter of logical inference from the facts that by accepting the advantage of the plaintiff's work they had promised to pay him a reasonable sum therefor. Both parties assumed that there was a contract between them, and the acceptance of the work by the defendants could not in fact give rise to the inference of a promise to pay the reasonable value. For these reasons this case seems to me to show that the obligation is one which is imposed by law in all cases where the acts are purported to be done on the faith of an agreement which is supposed to be but is not a binding contract between the parties. Vaughan Williams L.J. in the course of his judgment referred to *Nicholson* v. *Bradfield Union* (1), and said that the ground of the decision in that case, as he understood it, was that the law raised an implied contract by the corporate body to pay for the goods in question in that case. In my judgment, the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods. It is one of the cases referred to in books on contracts as obligations arising quasi ex contractu, of which a well known instance is a claim based on money had and received. Although I do not hold that the decision of the Court in *Ex parte Birkenshaw* (2) was wrong, I think that the passage I read from the judgment is not a correct statement of the law.

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(1) 1 C. B. (N. S.) 301.
(2) (1852) 21 L. J. (Q. B.) 349.
(3) [1903] 1 K. B. 772.

I accordingly think that the defendants must pay on the basis of a quantum meruit not only for the services rendered after December 31, 1930, and before the date of the invalid agreement, but also for the services after that date. I think the appeal should be allowed, and judgment given for such a sum as shall be found to be due on the basis of a quantum meruit in respect of all services rendered by the plaintiff to the company until he was dismissed. The defendants seem to me to be in a dilemma. If the contract was an effective contract by the company, they would be bound to pay the remuneration provided for in the contract. If, on the other hand, the contract was a nullity and not binding either on the plaintiff or the defendants, there would be nothing to prevent the inference which the law draws from the performance by the plaintiff of services to the company, and the company's acceptance of such services, which, if they had not been performed by the plaintiff, they would have had to get some other agent to carry out.

The appeal will be allowed, with costs here and below. There must be, of course, some kind of reference to ascertain the amount.

(1) (1866) L. R. 1 Q. B. 620.

(2) [1904] 2 K. B. 327.

GREENE L.J. In my opinion, the agreement of April 14, 1931, in so far as it purports to appoint the plaintiff managing director of the company, was altogether void. The only power which is given to the directors to appoint a managing director is a power to appoint one of their number, that is to say, a person who is a director: see art. 17 and cl. 72 of Table A in the First Schedule to the Companies (Consolidation) Act, 1908. The appointment as managing director of a person not a director would have been ultra vires a properly constituted board, and the circumstance that both such a board and the appointee thought that the appointee was a director would not, in my judgment, affect the matter. If this view be right, the position is not made any better by cl. 94 of Table A of the Companies (Consolidation) Act, 1908, or by s. 143 of the Companies Act, 1929, since those provisions (assuming that they would otherwise apply) do not empower a de facto board to do what a de jure board is incapable of doing.

There is also, I think, another ground for saying that the contract is void. At the date when it was executed, both parties believed that the plaintiff was a director and was capable of continuing to act as a director. This belief was essential to the making of the agreement and formed the basis upon which the parties purported to contract. The agreement was accordingly void ab initio on well recognized principles. I may quote as an accurate statement of the law a passage on p. 296 of Salmond and Winfield's Principles of the Law of Contracts: "The contract was entered into under a mistake as to the present existence of an essential fact recognised by the law as the foundation of the contract, and by its non-existence the contract is invalidated accordingly."

It was argued that the agreement is severable and that the acts to be performed under it by the plaintiff could be looked upon as merely managerial acts dissociated from his assumed position as director. I am unable to take this view. A managing director is in a very different position to that of a mere manager since he is able to attend and vote at meetings of the board, and from the point of view of the

Greene L.J.

company it was of importance that the person managing its affairs should be in a position to do this.

The plaintiff's claim, therefore, in so far as it relates to services rendered after the date of the agreement can only succeed upon the basis of a quantum meruit. It was argued, first, that in the present case the agreement was illegal and not void, and, secondly, that no claim on a quantum meruit can be made where there is a contract which is in fact illegal and not void. I will assume that this second argument is correct even in a case where the party who performs services under the contract is unaware of its illegality. (See, however, *Clay* v. *Yates*. (1)) The argument as to the illegality of the contract was based upon s. 141, sub-s. 5, of the Companies Act, 1929. It was said that the de facto directors were guilty of an illegal act in affixing the company's seal to the contract, and, further, that in so far as the contract (it is said) must be read as containing an implied agreement by the plaintiff to act as a director, it was an agreement to do illegal acts. This argument is, in my judgment, ill-founded, since the true view appears to me to be, as I have already said, that the agreement was void ab initio.

The question remains, however, whether the facts that the parties thought that there was a valid agreement and that the services rendered and accepted were performed under a supposed agreement precludes a claim upon a quantum meruit. Mr. Croom-Johnson argued that this question must be answered in the affirmative, and he relied upon a passage in the judgment of a Divisional Court in *In re Allison, Johnson & Foster, Ld.* (2) In that case a Mr. Birkenshaw had been appointed liquidator by a resolution of the company consequential upon a resolution for voluntary winding-up. He acted as liquidator for some six months, at the expiration of which an order was made by Farwell J. declaring that the proceedings at which the winding-up resolution and the resolution appointing Mr. Birkenshaw liquidator were passed were invalid ab initio. The company was subsequently put into compulsory liquidation, and Mr. Birkenshaw claimed in

(1) (1856) 1 H. & N. 73.

(2) [1904] 2 K. B. 327.

respect of work done by him in his assumed capacity as liquidator. This claim necessarily failed, but he also claimed on a quantum meruit. As I read the judgment, the Court treated the claim as being divisible into three possible heads, namely, (1.) a claim in respect of work connected with the liquidation of the company which it was assumed was validly proceeding, (2.) a claim in respect of work beneficial to the company for business purposes unconnected with the supposed liquidation, (3.) a claim in respect of work utilized with knowledge of the facts by the liquidator appointed in the compulsory winding up ; this claim would include matters falling under head (1.). The Court held that Mr. Birkenshaw would be entitled to claim upon a quantum meruit under heads (2.) and (3.). The passage relied upon by Mr. Croom-Johnson appears to me to refer only to head (1.). It is as follows (1): "There can be no implied contract for payment arising out of acceptance of the work done where the work was done upon an express request which turns out to be no request at all, but which down to the time when the whole of the work had been done was supposed by both parties to be valid and operative." This passage must, in my judgment, be read in relation to the subject-matter with which it is dealing—namely, work done under a supposedly valid winding-up resolution. I do not see how any request could in any circumstances be implied when the whole assumption upon which the work was done, and the only assumption upon which it would have been of any use to the company, namely, that a valid liquidation was in progress, turned out to be ill-founded. I doubt myself whether the passage relied on means more than this. If, however, it does involve the proposition mentioned by Greer L.J. in the judgment just delivered, I agree with the criticism of it there made. I agree also with the observations of Greer L.J. on this part of the case, and do not desire to add anything thereto.

With regard to the period before the date of the supposed contract, services rendered down to December 31, 1930, are covered by the payment of 948*l*. 6*s*. 9*d*. mentioned in clause 1

(1) [1904] 2 K. B. 330.

C. A.
1936
Craven-Ellis v. Canons, Ld.
Greene L.J.

of the agreement. This sum was paid and accepted by the plaintiff and, as I understand it, Mr. Pritt does not make any further claim in respect of this period even if the agreement is void. With regard to the period from January 1, 1931, to the date of the agreement (namely, April 14, 1931) the work done could not upon any view be said to have been done upon the assumption that the agreement was a valid one. I agree with the order proposed by Greer L.J.

Greer L.J. Talbot J. has read these judgments; he concurs in them and does not desire to add anything to them.

Appeal allowed.

Solicitors for appellant: *Kenneth Brown, Baker, Baker.*
Solicitors for respondents: *Ward, Bowie & Co.*

J. S. H.

1936
April 6.

GOVERNORS OF QUEEN ANNE'S BOUNTY *v.* PITT-RIVERS.

Ecclesiastical law—Tithe rentcharge—Application by titheowner to county court for payment—No notice of opposition by landowner—Right of landowner to be heard—Rules requiring notice of opposition, whether ultra vires—Order for payment and appointment of receiver—Alleged excess of jurisdiction—Remedy—Prohibition or appeal—Whether prohibition lies against receiver—Tithe Act, 1891 (54 *Vict. c.* 8), *s.* 2, *sub-ss.* 1, 7; *s.* 3, *sub-s.* 1—*Tithe Rentcharge Recovery Rules,* 1891–1933, *rr.* 5, 8, 9, 11.

The Tithe Act, 1891, contains the following provisions:—

Sect. 2: " (1.) Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act. . . .

"(7.) Rules under this Act may regulate the procedure practice and costs under this Act in county courts. . . . ."

Sect. 3: "(1.) The Lord Chancellor may, after consultation with the Rule Committee of the County Court Judges, make rules for carrying this Act into effect, and for regulating, providing, and prescribing any matter authorised by this Act to be regulated, provided, or prescribed by rules under this Act. . . . ."

Sect. 5: "(2.) . . . . when notice of opposition has been given within the prescribed time, the costs of a solicitor shall only be allowed for work done subsequent to the notice."

The Tithe Rentcharge Recovery Rules, 1891, as last amended in 1933, contain the following provisions:—

"2. A person claiming to be entitled to a sum due on account of tithe rentcharge . . . . shall file with the registrar of the court a notice of application. . . . . .

"5. A respondent desirous of opposing an application shall, at least seven clear days before the day appointed for the hearing, file with the registrar of the court notice of his opposition. . . . . .

"8. Where no notice of opposition is given and the amount claimed and costs have not been paid into court, then subject to the proviso hereinafter contained the facts stated in the notice of application shall be deemed to be admitted, and the court on the day appointed for the hearing may . . . . make an order for the recovery of the amount claimed and costs; and for that purpose shall either appoint a receiver or . . . . an officer to distrain: Provided that if a respondent appears on the day appointed for the hearing of the application and desires to oppose the application the court may, but on such terms . . . . as the court thinks fit, appoint another day for the hearing in lieu of that originally appointed, in order that such respondent may file his notice of opposition.

"9. Where a respondent files notice of opposition after the time limited . . . . but before an order is made by the court, the court may allow that respondent an opportunity of being heard on such terms . . . . as the court thinks fit; and in that case the court shall appoint another day for the hearing. . . . .

"11. A ground of opposition not mentioned in the notice of opposition shall not be entertained by the court except on such terms . . . . as the court thinks fit":—

Held, that on the true construction of the above provisions of the Act of 1891 the right given by s. 2, sub-s. 1, to a landowner who appears and desires to be heard of being heard by the county court before it makes an order is a right to be heard in the manner prescribed by such reasonable rules of procedure and practice as may have been made under s. 2, sub-s. 7, and s. 3, sub-s. 1, for the regulation of that right.

Held, further, that the rules set out above, purporting to control and regulate the right of a respondent landowner to be heard by the county court by requiring him to file notice of opposition and otherwise, are reasonable and not ultra vires the provisions of the Act.

of the agreement. This sum was paid and accepted by the plaintiff and, as I understand it, Mr. Pritt does not make any further claim in respect of this period even if the agreement is void. With regard to the period from January 1, 1931, to the date of the agreement (namely, April 14, 1931) the work done could not upon any view be said to have been done upon the assumption that the agreement was a valid one.

I agree with the order proposed by Greer L.J.

GREER L.J. Talbot J. has read these judgments; he concurs in them and does not desire to add anything to them.

Appeal allowed.

Solicitors for appellant: *Kenneth Brown, Baker, Baker.*
Solicitors for respondents: *Ward, Bowie & Co.*

J. S. H.

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GOVERNORS OF QUEEN ANNE'S BOUNTY *v.* PITT-RIVERS.

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Sect. 2: " (1.) Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act. . . . .

" (7.) Rules under this Act may regulate the procedure practice and costs under this Act in county courts. . . . ."

Sect. 3: " (1.) The Lord Chancellor may, after consultation with the Rule Committee of the County Court Judges, make rules for carrying this Act into effect, and for regulating, providing, and prescribing any matter authorised by this Act to be regulated, provided, or prescribed by rules under this Act. . . . ."

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The Tithe Rentcharge Recovery Rules, 1891, as last amended in 1933, contain the following provisions :—

" 2. A person claiming to be entitled to a sum due on account of tithe rentcharge . . . . shall file with the registrar of the court a notice of application. . . . . .

" 5. A respondent desirous of opposing an application shall, at least seven clear days before the day appointed for the hearing, file with the registrar of the court notice of his opposition. . . . . .

" 8. Where no notice of opposition is given and the amount claimed and costs have not been paid into court, then subject to the proviso hereinafter contained the facts stated in the notice of application shall be deemed to be admitted, and the court on the day appointed for the hearing may . . . . make an order for the recovery of the amount claimed and costs; and for that purpose shall either appoint a receiver or . . . . an officer to distrain: Provided that if a respondent appears on the day appointed for the hearing of the application and desires to oppose the application the court may, but on such terms . . . . as the court thinks fit, appoint another day for the hearing in lieu of that originally appointed, in order that such respondent may file his notice of opposition.

" 9. Where a respondent files notice of opposition after the time limited . . . . but before an order is made by the court, the court may allow that respondent an opportunity of being heard on such terms . . . . as the court thinks fit; and in that case the court shall appoint another day for the hearing. . . . .

" 11. A ground of opposition not mentioned in the notice of opposition shall not be entertained by the court except on such terms . . . . as the court thinks fit" :—

Held, that on the true construction of the above provisions of the Act of 1891 the right given by s. 2, sub-s. 1, to a landowner who appears and desires to be heard of being heard by the county court before it makes an order is a right to be heard in the manner prescribed by such reasonable rules of procedure and practice as may have been made under s. 2, sub-s. 7, and s. 3, sub-s. 1, for the regulation of that right.

Held, further, that the rules set out above, purporting to control and regulate the right of a respondent landowner to be heard by the county court by requiring him to file notice of opposition and otherwise, are reasonable and not ultra vires the provisions of the Act.

Reg. v. *Pawlett* (1873) L. R. 8 Q. B. 491 distinguished.

A landowner, who is dissatisfied with the order of a county court judge directing him to pay a sum on account of tithe rentcharge and desires to have it set aside, ought only to be granted a writ of prohibition to the judge for that purpose in a clear case of want of jurisdiction or excess of jurisdiction on the part of the judge; and in any other case he should proceed by appeal, more especially as a right of appeal is expressly given by s. 7 of the Tithe Act, 1891.

Where the order of a county court judge directing the recovery from a landowner of a sum on account of tithe rentcharge and the appointment of a receiver for that purpose is alleged to be clearly in excess of his jurisdiction, *Quaere* per Talbot J., whether prohibition will lie against the receiver as well as against the judge.

APPEAL from an order of Porter J. at Chambers.

On December 3, 1935, in the Shaftesbury County Court of Dorset three applications were heard on behalf of Queen Anne's Bounty (hereinafter called " the titheowners ") against Captain George Henry Lane-Fox Pitt-Rivers (hereinafter called " the landowner ") for the recovery by the appointment of a receiver of certain tithe rentcharge arising out of lands owned by him situate respectively in three parishes in the county of Wilts.

The landowner, who appeared before the court in person, claimed the right to be heard, notwithstanding that he had not filed any notice of opposition.

The judge called the attention of the landowner to the Tithe Rentcharge Recovery Rules, 1891–1933, of which r. 5 (1) requires that " A respondent desirous of opposing an application shall, at least seven clear days before . . . . the hearing, file with the registrar of the court notice of his opposition . . . . " ; and r. 8 provides that where no notice of opposition is given, the facts stated in the notice of application shall be deemed to be admitted, and the court may make an order for the recovery of the amount claimed.

The landowner submitted that the Tithe Act, 1891, s. 2, sub-s. 1 (1), only empowered the county court to make an order for the recovery of the sum claimed from the landowner " after hearing such owner if he appears and desires to be heard." (1)

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(1) The provisions of the Act and of the Rules so far as relevant are set out in the headnote.

1936

GOVERNORS OF QUEEN ANNE'S BOUNTY *v.* PITT-RIVERS.

The judge said that if the titheowners' solicitor asked for an order he should grant it unless the landowner asked for an adjournment of the case to the next court in order to enable him to file his notice of opposition; but the landowner did not ask for any adjournment for that purpose. The judge then said that in order that the landowner should have no grievance he should adjourn the hearing to the next court. Later, after hearing further statements by both sides, the judge made an order on all the applications for the recovery of the tithe rentcharge claimed by the appointment of a receiver—namely, Mr. George Norman Rawlence.

On January 15, 1936, the landowner, by leave of a judge in Chambers, took out a summons in the High Court for a writ of prohibition to the county court judge, to the receiver, and to the titheowners to prohibit them from further proceeding in the matter of the three above-mentioned applications.

The landowner's application for leave to take out the summons for a prohibition was supported by an affidavit made by him in which he alleged (inter alia) that at the hearing of the case in the county court he had intended to oppose the making of the orders asked for on the grounds; that he had applied for a remission in respect of the tithe rentcharge alleged to be charged upon the said lands and had received assurance that upon supplying certain information which had been duly supplied such remission would be granted on the terms agreed to by Queen Anne's Bounty but that these terms were not fulfilled by that body; that Queen Anne's Bounty was not the owner of the tithe rentcharge mentioned in the applications to the county court or the titheowner or the owner of tithes or a person having any interest in or claim to tithes within the meaning of the Tithe Acts, 1836 or 1891; that he intended to move that he might be allowed to show cause why Mr. G. N. Rawlence should not be appointed receiver of rents; that he had submitted to the county court judge that he was entitled to be heard upon the applications to the county court; that he had submitted that the county court judge had no jurisdiction to make an order appointing a receiver without giving him an opportunity to be heard; and that by reason of the order appointing a receiver he was certain to be greatly prejudiced and put to loss.

On March 3, 1936, Porter J. at Chambers made an order dismissing the summons.

The landowner appealed.

Montgomery K.C. and *Cecil Binney* for the landowner, appellant:

The appeal should be allowed, and an order should be made by this Court for a writ of prohibition to the county court judge, the receiver, and the respondents against further proceeding in the matter. The county court judge had in the circumstances no jurisdiction to make the orders which he made for the recovery of the sum claimed from the landowner. Apart from the Tithe Rentcharge Recovery Rules, 1891–1933, the judge had no jurisdiction to make these orders, and these Rules did not empower him to make them without first hearing the landowner. It is, no doubt, provided by r. 5 that a landowner desirous of opposing an application for tithe rentcharge shall at least seven clear days before the hearing file notice of his opposition; but that rule does not say that if the notice of opposition is not filed within the time mentioned, the court may make an order without hearing the landowner. It is provided by r. 8 that where no notice of opposition is given and the amount claimed has not been paid into court, the court may make an order for the recovery of the amount claimed, but that is subject to the proviso that if the landowner appears and desires to oppose the application the court may appoint another day for the hearing in order that the notice of opposition may be filed. By r. 9 where a landowner files notice of opposition after the time limited but before an order is made, the court may allow him an opportunity of being heard on terms, and may appoint another day for the hearing. By r. 11 a ground of opposition not mentioned in the notice of opposition may be entertained by the court on such terms as it thinks fit. These rules, which are the chief rules relevant to this matter, do not on their fair interpretation empower the judge to make an order for recovery of tithe rentcharge without hearing the landowner. If they purport to do so, then in so far as they do so they are ultra vires the rule-making power conferred by the Tithe Act, 1891. The relevant provisions of the Act are s. 2, sub-s. 1, which provides that the county court may order that the tithe rentcharge due be recovered from the owner of the lands "after hearing such owner if he appears and desires to be heard"; and s. 2, sub-s. 7, and s. 3, sub-s. 1, which provide for the making of rules for regulating the procedure and practice under the Act, and constitute a rule-making body for that purpose. On the true construction of these provisions, s. 2, sub-s. 1, gives the landowner, if he appears and desires to be heard, an absolute right to be heard before an order can be made against him; and s. 2, sub-s. 7, and s. 3, sub-s. 1, do not authorize the making of any rule which would impose conditions or restrictions upon that right of the landowner. These latter provisions authorize the making of rules of practice and procedure, but the rules here in question, if they deprive the landowner of his right to be heard by the court in proceedings to which he is a party, are not mere rules of practice and procedure but are rules affecting the substantive rights of the landowner. These rules in so far as they are rules of practice may be intra vires, but in so far as they interfere with a party's right to be heard in court they are ultra vires. The course which the county court judge ought to have taken on finding that the landowner had not filed notice of opposition and that he appeared and desired to be heard was as follows: He should have asked him whether he desired to say anything. If he had replied that he did not, the judge might then have made an order. If, on the other hand, he had replied that he was desirous of saying something, as he in fact showed that he was, the judge should have granted an adjournment. It is clear from the notes of the proceedings in the county court that the judge did not take that course. He refused to hear the landowner at all unless he filed or undertook to file a notice of opposition; he granted an adjournment and afterwards withdrew it; and he then made the order for recovery of the sum claimed by means of a receiver without having heard the landowner, though he appeared and desired to be heard.

Sandlands K.C. and *A. H. Armstrong* for the titheowners, respondents:

Porter J. rightly declined to grant the application of the appellant for a writ of certiorari. The county court judge had jurisdiction to make the order for the recovery of the tithe rentcharge claimed and for the appointment of a receiver. It is true that s. 2, sub-s. 1, of the Tithe Act, 1891, provides that the county court may order that a sum in respect of tithe rentcharge issuing out of lands may be recovered from the owner of the lands "after hearing such owner if he appears and desires to be heard." That sub-section must, however, be construed along with s. 2, sub-s. 7, and s. 3, sub-s. 1, of the Act, which provide for the making of rules for regulating the practice and procedure under the Act and for carrying the Act into effect, and constitute a rule-making authority for that purpose, and which in so doing authorize the making of rules controlling all the steps in the proceeding from the making of the application down to the hearing in court, including the appearance and opposition of the landowner: *Yonge* v. *Toynbee* (1) and per Slesser L.J. in *Queen Anne's Bounty* v. *Thorne.* (2) It must also be construed along with s. 5, sub-s. 2, which appears to contemplate that the rules may regulate the right of the landowner to be heard. When s. 2, sub-s. 1, is construed along with these subsequent provisions it only gives the landowner a right to be heard in accordance with such reasonable rules as may have been made under these subsequent provisions. The Rules made under the Act have been altered from time to time, but the Rules which were in force at and since the time when these proceedings began are the Tithe Rentcharge Recovery Rules, 1891–1933. By r. 5 of these Rules a respondent landowner desirous of opposing

(1) [1910] 1 K. B. 215.

(2) [1934] 2 K. B. 175, 190.

an application shall, at least seven clear days before the day appointed for the hearing, file notice of his opposition. By r. 8, where no notice of opposition is given and the amount claimed and costs have not been paid into court, then, subject to the proviso to that rule, the facts stated in the notice of application shall be deemed to be admitted, and the court may on the day appointed make an order for the recovery of the amount claimed ; Provided that if a respondent appears on the day appointed and desires to oppose the application the court may, but on such terms as it thinks fit, appoint another day for the hearing, in order that the respondent may file his notice of opposition. By r. 9, where a respondent files notice of opposition after the time limited but before an order is made, the court may allow him an opportunity of being heard on such terms as it thinks fit, and may appoint another day for the hearing. By r. 11 a ground of opposition not mentioned in the notice of opposition shall not be entertained except on such terms as the court thinks fit. These rules in controlling the right of a respondent landowner to be heard before an order is made against him are rules regulating the procedure and practice under the Act within the meaning of s. 2, sub-s. 7, of the Act, and are rules for carrying the Act into effect within the meaning of s. 3, sub-s. 1, of the Act ; and they are also reasonable rules. They are, therefore, within the powers of the rule-making authority constituted by the Act, and are in all respects valid and effective. The provisions of the Act and the rules which deal with these matters provide a complete machinery for the marshalling of the application and the opposition thereto down to the hearing : per Slesser L.J. in *Queen Anne's Bounty* v. *Thorne*. (1) When a respondent has not duly filed his notice of opposition the rules give the county court judge a discretion to adjourn the application on such terms as he thinks fit in order to give the respondent an opportunity of filing his notice of opposition. The matter is entirely in the discretion of the judge, and if he comes to the conclusion that an adjournment ought not to be granted, it is not only

(1) [1934] 2 K. B. 191.

his right but his duty to refuse it and to make the order for payment: *Rex* v. *Clements* (*Judge*). *Ex parte Queen Anne's Bounty*. (1) The rules do not give the respondent any right to an adjournment. If they did, a respondent would be able to ask for an adjournment time after time, and the hearing might be indefinitely postponed. In the present case the judge offered the respondent an adjournment for the purpose of filing his notice of opposition, but afterwards, coming to the conclusion that the respondent did not intend to file a notice of opposition, the judge in the exercise of his discretion properly refused an adjournment and made the order asked for by the applicant. Even if the county court judge was wrong in refusing to allow the landowner to be heard, an order ought not to be made directing that a writ of prohibition should issue against him. Prohibition ought only to be resorted to where the judge has manifestly acted without, or in excess of his jurisdiction. Here the judge, in making the order asked for without hearing the respondent, acted, as he was entitled to act, on a fair view of the construction of the Act and rules, and did not act without jurisdiction. In a case in which there has been no such want of jurisdiction as has resulted from a contravention of the general law or a violation of some fundamental principle of justice a party who thinks himself aggrieved by the judgment of the county court judge should in general proceed to question it by the ordinary method of appeal: see per Scrutton L.J. and Atkin L.J. in *Rex* v. *North. Ex parte Oakey* (2); and more especially should he adopt that method where the case arises under the Tithe Act, 1891, which by s. 7 expressly gives him a right of appeal.

Montgomery K.C. in reply:

The provision in s. 2, sub-s. 1, of the Act that the county court judge may make an order against the landowner "after hearing such owner if he appears and desires to be heard" does not refer to any mere formal entering of appearance by the landowner but to his physical appearance in court; and it means that if the landowner actually appears before the court and desires to be heard the court cannot make an order until it has heard him. The rules, in so far as they assume to cut down the right to be heard of the landowner who appears and desires to be heard or to enlarge the jurisdiction of the court to refuse to hear him until he has filed or undertaken to file a notice of opposition, are ultra vires the rule-making powers conferred by the Act, which are expressly limited to matters of procedure and practice only. The Act gives the county court judge a limited jurisdiction to make an order against the landowner for payment of the sum claimed only in a case in which he does not appear and desire to be heard. Here the county court judge in making an order against the landowner who did appear and desire to be heard has exceeded his jurisdiction, and the proper remedy of the landowner is a writ of prohibition to the judge and other parties concerned to prohibit them from proceeding further in the matter. In *Rex* v. *North. Ex parte Oakey* (1) prohibition was directed to issue to the judge of a consistory court who had made an order against a party without hearing him on the ground that the judge had exceeded his jurisdiction. The present case is a stronger case for prohibition than that case was, because in that case the party had only an inherent right to be heard, whereas here the landowner had not only an inherent, but also a statutory, right to be heard. This case is also a stronger case than *Rex* v. *Clements (Judge). Ex parte Queen Anne's Bounty* (2), in which the county court judge was directed by mandamus to make an order against the landowner for payment of the sum claimed, inasmuch as in that case the landowner did not appear before the court and express a desire to be heard, whereas here the landowner did appear before the court and strenuously desired to be heard.

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(1) (1933) Times Newspaper, July 28, 1933, p. 3.

(2) [1927] 1 K. B. 491, 503, 506.

Talbot J. This is an appeal from the refusal of Porter J. in Chambers to allow a writ of prohibition, or a writ in the nature of prohibition, to issue to the county court judge sitting at the Shaftesbury County Court in respect of certain applications for the recovery of tithe rentcharge which he heard there. The judge had three applications against the appellant before him, and had in fact made an order under s. 2 of the Tithe Act, 1891, for the appointment of a receiver, which is one of the only authorized ways in which tithe rentcharge can be recovered if it is unpaid, and the prohibition is asked for against the judge and the receiver. I express no opinion on the question whether in any case process of that nature is good against the receiver.

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(1) [1927] 1 K. B. 491.

(2) Times Newspaper, July 28, 1933, p. 3.

The circumstances in which this matter arose were as follows: The appellant had not given any notice of opposition to the applications in the county court, but he nevertheless attended the court and claimed then, as he claims now, that he had the right to be heard. Considerable discussion took place, and the appellant says what, up to a point at any rate, is true, that the judge refused to hear him, and that he was in fact not heard. So far as may be ascertained from the notes of the evidence given at the proceedings, which are verified by affidavit, the appellant did not specify at all clearly the precise points on which he desired to be heard. It is not suggested that the appellant, who is not a lawyer, put his case quite as counsel has argued it on his behalf before this Court. In substance, however, he relied on the same contentions. He cited s. 2, sub-s. 1, of the Act of 1891, which empowers the county court to make an order against the owner of the lands out of which the tithe rentcharge is claimed to issue, "after hearing such owner if he appears and desires to be heard." He argued that these words import a condition on which the court may order that the sum due be recovered in the manner provided by the Act and not in any other manner. He said that the word "appears" as there used has only its ordinary English meaning, and does not mean appears by a certain form of document or in any other precise way. He said that he did appear in the flesh, so to speak, and, further, that he desired and asked to be heard. When he put forward that contention he was confronted by the rules made under the Act of 1891. The court was reminded very properly that there have been several editions of these rules, and it was referred to certain differences between the successive editions. There is no dispute, however, about what edition of these rules is now in force. The appellant said, as he still says, that, so far as they qualify and abridge the general right which the Act confers by s. 2, sub-s. 1, upon the landowner to appear and be heard, or rather so far as they qualify the general limitation of the powers of the judge which the Act imposes by that sub-section, namely, that his powers are only to be exercised after he has heard the landowner if he appears and desires to be heard, the rules are beyond the powers of the rule-making body.

In order to determine what the powers of the rule-making body are, the relevant provisions of the Act must be considered. The first of these provisions is s. 2, sub-s. 7: "Rules under this Act may regulate the procedure practice and costs under this Act in county courts," and may direct what service shall be good service, and may provide that if the owner is not known certain procedure may be used. Then by s. 3, sub-s. 1: "The Lord Chancellor may, after consultation with the Rule Committee of the county court judges, make rules for carrying this Act into effect, and for regulating, providing, and prescribing any matter authorised by this Act to be regulated, provided, or prescribed by rules under this Act. . . . ." That provision is evidently directed to the same object, among others perhaps, as is s. 2, sub-s. 7, which uses the words "may regulate the procedure practice and costs under this Act in county courts." The whole of the appellant's argument on this point is that these two last mentioned sub-sections do not abridge the unambiguous, general and sweeping condition which is imposed by s. 2, sub-s. 1, that the county court must hear the owner of the lands if he appears and desires to be heard, and that it is only when the court has done so that it may make the order which is essential for the recovery of tithe rentcharge. It is contended for the respondents that that is a wholly unreasonable way of construing s. 2, sub-s. 1, and that the fair meaning of these three sub-sections taken together is that the owner must be allowed to appear and to express a wish to be heard, but, subject to his being allowed to do so, the procedure as to that matter, as to any proceeding before the county court, may be regulated by rules made by the body which is empowered to make rules under the Act. In my opinion the determination of this question must turn ultimately upon how that legislation is viewed. I think that it is only necessary to read these provisions of the Act and to consider the purposes for which rules under the Act are authorized to be made, in order to see that the mode of construing s. 2, sub-s. 1, proposed by the appellant is a very narrow and, it might not be unfairly said, pedantic way of construing that provision; and that the construction contended for by the respondents is to be preferred.

I do not think it would be serving any useful purpose to enlarge upon the effect which would be produced if the Court yielded to the appellant's argument, but it may be observed that to do so would clearly involve cutting down very considerably the power of the rule-making authority to make a code of rules, and cutting it down, I am bound to say after hearing the argument, to an extent that does not appear to have been in the contemplation of those who framed the Act of 1891 and of those who were responsible for the language of the sections giving the authority its power to make rules. The other construction is, in my opinion, a far juster, more natural and more reasonable construction of the provisions of the Act. Expressed in simple language it amounts to this, that the Act provided, no doubt most justly, that the landowner if he wished to be heard had to be heard, but that the procedure to be followed, that is to say such details of procedure as are dealt with under the innumerable rules now regulating many matters under the authority of Parliament, was left to this rule-making body. It is, in my opinion, an unreasonable extension of the provision that the landowner is to be heard, and a pressing of it beyond its natural meaning also, to say that it means that the rule-making body had no power to make rules as to the attendance and hearing of the landowner.

As to the question whether the rules are within the powers of the Act, I think that the argument for the appellant covered a very considerable range. If I followed it correctly it involved the contention that five or six of these rules went beyond the powers of those who made them. In this connection it is perhaps not immaterial, besides calling attention to the importance of the persons who were charged with the duty, or at any rate with the power of making these rules, to notice how the rules are described by their authors. The heading of this branch of the rules is: "Procedure on Application for Recovery of Tithe Rentcharge." That is, of course, not conclusive that the rules are within the powers of the Act, but one is confronted with the fact that the Lord Chancellor, with advice which is certainly of the kind to which most people would be disposed to listen on a matter of this nature, considered that the rules which they were issuing for the public, and which, if they are within their powers, have the force of statute, were such as could be correctly described by the above heading, and therefore that they were presumably rules of procedure within the meaning of the Act. Unless they are wrong about that, the argument for the appellant on this point disappears.

It is not necessary to read all the rules which have been challenged. The principal rule is r. 8, which is one of the collection purporting to deal with the procedure on these applications: "Where no notice of opposition is given and the amount claimed and costs have not been paid into court, then subject to the proviso hereinafter contained the facts stated in the notice of application shall be deemed to be admitted, and the court on the day appointed for the hearing may, without requiring attendance by or on behalf of the applicant, make an order for the recovery of the amount claimed and costs; and for that purpose shall either appoint a receiver or . . . . an officer to distrain." It is not, of course, for the Court to criticize the rules or to say whether this is a wise rule or not, but it is just the kind of rule that those who had to deal with the procedure on these matters would be likely to consider convenient. It says that where there has been no notice of opposition nor a payment into court, subject to the proviso which will be read presently, the facts stated in the notice of application shall be deemed to be admitted, that is to say that those matters have not got to be proved in court, and thereupon the court has power, without requiring attendance by or on behalf of the applicant, to make the order asked for, which may be an order for the appointment of a receiver. Then there is a provision to guard against the party's being taken by surprise or unduly pressed: "Provided that if a respondent appears on the day appointed for the hearing of the application and desires to oppose the application the court may, but on such terms as to payment into court, costs or otherwise as the court thinks fit, appoint another day for the hearing in lieu of that originally appointed, in order that such respondent may file his notice of opposition."

It appears that at the hearing, in view of the fact that the appellant was not represented either by solicitor or counsel, there was some confusion, but he apparently never defined the particular points on which he wished to challenge the applications, or led the court to believe that there was any reason why in his favour the power which the proviso to r. 8 confers should be exercised. The judge did indeed offer the appellant an adjournment, but that was not accepted. The appellant in fact did what he thought was wise and adhered to his claim to be heard then and there. However that may be, it is in my opinion quite possible that that offer of an adjournment must be taken to have been withdrawn before the order complained of and which the appellant attacks was actually made.

The appellant, in order to prevent the matter from being further proceeded in, has applied for a writ of prohibition against the county court judge and the receiver. He has applied for prohibition notwithstanding that he has a right of appeal. Although the existence of a right of appeal is not fatal, or necessarily fatal, to a right to prohibition, still prohibition ought not to be lightly granted. It ought to be granted only where there is a clear case of excess of jurisdiction on the part of the court. It is useful to remember that in this case Parliament, perhaps rather unusually, and possibly without its being actually necessary, has thought fit in s. 7 of the Act of 1891 to call special attention to the matter of appeal from an order of the county court judge, and to give an appeal in case there should be any doubt as to whether it would lie. The section reads thus: "If any party in any matter or action under this Act shall be dissatisfied with the determination or direction of the judge of the county court in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court." It is, in my opinion, evident from that section that an appeal was contemplated as the normal way of challenging any order of the county court judge in any action arising under this Act, and it emphasizes the view that in order to obviate resort to the extreme remedy of prohibition, the effect of which is to render the order and the appointment of a receiver wholly bad, and merely a useless and idle form, the right of appeal is expressly, and not merely by application of the general law, conferred upon parties to proceedings in the county court.

I should perhaps call attention to one other matter—namely, the case of *Reg.* v. *Pawlett.* (1) It is not suggested that that case directly governs this, but it is certainly a case of weight which must be considered. There are considerable differences between that case and this. The report of that case is not very full, but the rule was I think there held by the Court to be bad because it cut down the provision of a statute with regard to the procedure on appeal to quarter sessions against the refusal of a certificate for a liquor licence. The rule which was brought into operation by the court of

(1) L. R. 8 Q. B. 491.

quarter sessions was not a rule enacted under an Act giving a right of appeal, but was simply one of the general rules of procedure of the court of quarter sessions, and presumably, therefore, to be justified only under the ordinary rule-making power which every court of the status of quarter sessions prima facie has, and, of course, on a matter on which the Act directly involved had made express provisions of its own. The Court of Queen's Bench held that the application of the rule could not be justified and that quarter sessions could not rely on one of their ordinary general rules of practice as a ground for holding that the appellant had not a right to be heard.

On a consideration of the whole matter, therefore, the judge in Chambers was in my opinion right in refusing to allow a writ of prohibition to issue, and the appeal should be dismissed.

ATKINSON J. I agree. It is not suggested that the county court judge did not act in accordance with the Rules under the Tithe Act, 1891, but it is argued that under s. 2 of that Act the judge had jurisdiction to make the order in this case only after hearing the appellant if he appeared and desired to be heard. It is pointed out that he did appear and that he did desire to be heard and that he was in fact not heard. The question then arises whether the rules which have been published control or regulate this right of being heard. Counsel for the appellant says frankly that they do regulate and control and that they do impose conditions on the right of being heard, and that because they do so they are ultra vires. In my opinion, however, the Act did not confer upon a person in the position of the appellant an unregulated right of audience. To my mind, s. 5 of the Act makes it quite clear that the rules and regulations contemplated by s. 2, sub-s. 7, and by s. 3, sub-s. 1, may regulate the right of being heard. In s. 5, sub-s. 2, there is a reference to notice of opposition being given within a prescribed time, and the point of the sub-section is that no costs are to be allowed for anything done by the applicant before he receives a notice of opposition. I repeat that that seems to me to show clearly that the rules and regulations which are to be made may include rules and regulations controlling the right of being heard, which the appellant prima facie had. Of course any rules and regulations made must be reasonable. No suggestion has been made in this case that the rules are unreasonable, always supposing that there was power to make them. If they were unreasonable, I have no doubt that they would be ultra vires, but here they were reasonable and, one would have thought, beyond question. I can see nothing in r. 2 which prevents a respondent who has not given a notice of objection and who does not desire an adjournment from asking to be heard on the basis that all the allegations in the notice of claim are true. He would, in my opinion, very likely have a right to be heard on the question who should be appointed receiver. In this particular case, however, the appellant stated that he desired to give notice of objection, and it was then for the county court judge to say whether or not an opportunity for doing so should be afforded. It is quite true that the judge began by saying that he would give the appellant that opportunity, but after hearing him he changed his mind and declined to give an opportunity, by granting an adjournment, of giving notice of objection. All that was well within his jurisdiction. If it had been thought that he had exercised his jurisdiction in a manner contrary to law or equity, then, as my brother has pointed out, the proper remedy would be one of appeal under s. 7 of the Act of 1891.

It is in my opinion impossible to say here that the county court judge went beyond his jurisdiction, on the assumption that the rules which have been published and under which he acted are authorized by the Act. In my opinion, they are so authorized, and are reasonable. They are authorized by being reasonable, and there is no ground whatever for saying that the county court judge exceeded his jurisdiction. The appeal should therefore fail.

Appeal dismissed.

Solicitors for appellant: *Butt & Bowyer, for Rutter & Rutter, Shaftesbury, Dorset.*

Solicitors for respondents: *The Solicitor to Queen Anne's Bounty, for Ffooks & Grimley, Sherborne, Dorset.*

J. R.

1936
April 30.

DAVIS *v.* LISLE.

Police—Right to enter and remain on private premises—Inquiry with regard to suspected offence—Assault and obstruction—" In execution of duty "—Trespass—Metropolitan Police Act, 1839 (2 & 3 *Vict.*, *c.* 47), *s.* 18*—Prevention of Crimes Amendment Act,* 1885 (48 & 49 *Vict.*, *c.* 75), *s.* 2.

The respondent, a police officer, believing that an offence had been committed by the servants of the appellant in causing an obstruction in the highway with a motor lorry, followed the lorry into the appellant's garage to make inquiries as to the person responsible for the supposed obstruction. The respondent did not obtain the appellant's permission to enter the garage, nor had he a warrant authorizing him to enter it. The appellant directed the respondent to leave the premises, but the respondent claimed to be entitled to remain on them and the appellant assaulted him:—

Held, that, even if the respondent had a right to enter the garage to make inquiries, he became a trespasser after the appellant had told him to leave the premises, and that he was not therefore acting thenceforward in the execution of his duty, with the result that the appellant could not be convicted of assaulting or obstructing him in the execution of his duty.

Great Central Ry. Co. v. *Bates* [1921] 3 K. B. 578 applied and explained.

CASE stated by the County of London Quarter Sessions.

The appellant, Sidney Davis, appealed to quarter sessions against convictions at Old Street Police Court of having (*a*) on July 11, 1935, unlawfully assaulted the respondent, Charles Lisle, a constable of the Metropolitan Police Force, then in the execution of his duty as such constable, contrary to s. 18 of the Metropolitan Police Act, 1839; (*b*) on July 11, 1935, unlawfully wilfully obstructed the respondent, a constable of the Metropolitan Police Force, then and there in the execution of his duty as such constable, contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885; and (*c*) on July 11, 1935, unlawfully, wilfully, and maliciously committed damage to certain property, to wit, a serge tunic of and belonging to the Receiver of the Metropolitan Police Force by then and there wilfully and maliciously tearing the said tunic, such damage being to an amount not exceeding 20*l.*, to wit, to the amount of 7*s.* 6*d.*, contrary to s. 14 of the Criminal Justice Administration Act, 1914.

On the hearing of the appeal the following facts were proved or admitted:—

The appellant was a member of the firm of R. Davis, contractors and occupiers of a railway arch, which was used by them as a private garage at 8A, Cudworth Street, Bethnal Green, London. At about 6.50 P.M. on July 11, 1935, two police officers on duty—namely, the respondent, who was in plain clothes, and P.C. Rose, who was in uniform—noticed a motor lorry which, in their opinion, was causing an obstruction in the highway, outside the garage. Two men were repairing the lorry in the highway and committing an offence against s. 54, sub-s. 6, of the Metropolitan Police Act, 1839. The two police officers went along the street and returned about five minutes later. On their return they noticed that the lorry had been moved into the garage. The two police officers then entered the garage to make inquiries as to the person responsible for the obstruction. Neither of the police officers requested or obtained permission to enter the garage, and neither possessed, or was authorized by, a search warrant to enter and/or search the garage. The two men who had been seen previously at work underneath the lorry in the street were similarly occupied underneath the lorry in the garage and the respondent spoke to them, the police constable in uniform standing near the door. The appellant then entered the garage from the street, pushing past P.C. Rose and saying: "What's this? What do you want here?"; to which P.C. Rose replied: "My colleague is a police constable. May we see the person in charge of this vehicle?" The appellant then in abusive and obscene language said: "Get outside—

you can't come here without a search warrant." The respondent was in the act of producing his warrant card when the appellant rushed at him and struck him in the chest and stomach with his fist and committed the assault and did the damage complained of.

The court of quarter sessions were of opinion that the appellant assaulted and obstructed the respondent in the execution of his duty and dismissed the appeals against all three convictions.

The appellant appealed.

Croom-Johnson K.C. and *J. F. Eastwood* for the appellant. The appeal should be allowed, as, when the appellant struck the respondent, the respondent was not acting in the execution of his duty, but was a trespasser on the appellant's premises. It is not conceded that the respondent and the other police officer had any right to enter the appellant's premises to make inquiries, there being nothing to connect the appellant with any offence which might have been, or be about to be, committed, but, even if it was lawful for the officers to enter the premises in the sense that they did not commit trespass in so doing, they clearly had no right to remain on the premises after the appellant had requested them to leave. The production by the respondent of his warrant card must be regarded as evidence of his intention to remain on the premises in spite of that request of the appellant.

[They referred to *Galliard* v. *Laxton* (1); *Codd* v. *Cabe* (2); *Great Central Ry.* v. *Bates* (3); *Thomas* v. *Sawkins.* (4)]

G. G. Raphael for the respondent. The respondent was entitled to enter the appellant's premises to obtain information about the suspected offence, because the persons whom he believed to have committed it were on those premises. There was, moreover, an implied invitation from the appellant to any person having lawful business with him to enter the garage. The two officers went to the only place where they could attract the appellant's attention and there is no evidence that they went further than was necessary to establish the object of their visit. If, however, the proper inference from the fact that the respondent began to produce his warrant card was that he was thereby asserting a right to remain despite the appellant's request that he should leave the premises, it is conceded that he was then no longer acting in the execution of his duty.

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(1) (1862) 2 B. & S. 363.
(2) (1876) 1 Ex. D. 352.
(3) [1921] 3 K. B. 578.
(4) [1935] 2 K. B. 249.

Lord Hewart C.J. If this case is accurately stated, as we must take it to be, the respondent relied at quarter sessions on the argument that the police officers had seen an offence actually being committed in the street and were therefore acting in the execution of their duty in entering and being on the appellant's premises, because the offenders then were on those premises. On that argument quarter sessions came to the conclusion that the officers were acting in the execution of their duty and convicted the appellant accordingly.

It is necessary, I think, to distinguish two things. Whether these officers at the material time were acting in the execution of their duty is one question and it is quite a different question whether that which the appellant did was justified by the view which he took that the officers were trespassers. I am not dealing with that second question at all. It may well be that it may have to be determined hereafter. The point which is raised here with regard to the appellant's first two convictions is whether the officers were at the material time acting in the execution of their duty. In my opinion, they were not, and there are no grounds on which they can be held to have been so acting. The only ground which is put forward in support of the contention that they were so acting seems to me to be quite beside the point. I feel a difficulty in envisaging the legal proposition that because the police officers had witnessed an offence being committed on the highway they were acting in the execution of their duty in entering and remaining on private premises because the offenders then were on those premises. Admittedly, the officers had no warrant entitling them to search the premises. It is one thing to say that the officers were at liberty to enter this garage to

1936

DAVIS
v.
LISLE.

Lord Hewart C.J.

make an inquiry, but quite a different thing to say that they were entitled to remain when, not without emphasis, the appellant had said: "Get outside. You cannot come here without a search warrant." From that moment on, while the officers remained where they were, it seems to me that they were trespassers and it is quite clear that the act which the respondent was doing immediately before the assault complained of was tantamount to putting forward a claim as of right to remain where he was. The respondent was in the act of producing his warrant card. That was after the emphatic order to "get out" had been made. Mr. Raphael, with his usual candour, has admitted that, if the finding in the case that the respondent was in the act of producing his warrant card is fairly to be construed as meaning that he was asserting his right to remain on the premises, it is not possible to contend that at that moment the respondent was acting in the execution of his duty. I think it is quite clear that the act of producing his warrant card constituted the making of such a claim. I cannot think that there is any ambiguity about it.

The law on the matter seems to me to be reasonably plain. *Great Central Ry. Co.* v. *Bates* (1) seems to me to be in point. I should like to read a passage from the judgment of Atkin L.J. (2): "This," he said, "is a matter of very considerable importance, because the case has been put on the analogy of a person having a right as a matter of public duty to enter into premises, and we know that such powers and privileges are occasionally given to persons who are not constables. It appears to be very important that it should be established that nobody has a right to enter premises except strictly in accordance with authority."

In my opinion, it is not possible to maintain the conclusion that at the material time the respondent was acting in the execution of his duty as a constable. But that conclusion by no means disposes of everything contained in this case. It does not dispose of the question whether the assault which was in fact committed was justified. We have not the

(1) [1921] 3 K. B. 578.

(2) Ibid. 582.

materials before us which would enable us to determine that question. Nor was the appellant prosecuted for assault. He was prosecuted for assaulting and obstructing a police officer in the execution of his duty. Furthermore, the conclusion to which I have come does not affect the third conviction—that of damaging a tunic by "wilfully and maliciously tearing" it. On that part of the case no question arises whether at that moment the officer was acting in the execution of his duty and I see no reason why we should interfere with that conviction. With regard to the first two convictions, I think that the conclusion of quarter sessions was erroneous and that, with regard to those two convictions, which are the real pith and substance of this case, the appeal ought to be allowed and the case go back to the court of quarter sessions with the direction that at the material time the respondent was not acting in the execution of his duty.

DU PARCQ J. I agree with my Lord as to the proper result of this appeal. The argument has not satisfied me that it was the duty of the respondent to enter the appellant's garage to pursue inquiries, but, whether my view on that point is right or wrong, I am quite clear on all the authorities that the respondent had no right to remain on the premises when once the appellant had indicated his wish that he should leave them. If the respondent had no right to remain, it is clear that he was not acting in the execution of his duty when he did remain, and when, as I read the Case Stated, he claimed the right to remain.

As *Great Central Ry. Co.* v. *Bates* (1) has been referred to, I should like to say, from a fairly clear recollection of that case as well as from what appears in the judgments, that it is wrong to say, as the headnote and the statement of fact say, that the police constable who was there concerned entered the warehouse in the execution of his duty. It is easy to see how the mistake, if as I think it was a mistake, arose, and no criticism ought to be directed to the learned

(1) [1921] 3 K. B. 578.

reporter because of it. Lord Sterndale M.R. at the beginning of his judgment says: "It appears that a constable named Thompson was injured while acting in the execution of his duty, and was paid compensation by his employers." That, no doubt, accounts for the presence of those words in the headnote and statement of fact, but when Lord Sterndale's judgment is read as a whole and the judgment of Atkin L.J. is also read, it seems to be plain that neither member of the Court decided that the constable was acting in the execution of his duty. The accident arose out of his employment and for that reason he was paid compensation by his employers. I say this because the headnote might in the present case to some extent have misled quarter sessions.

GODDARD J. I agree. The case seems to me to raise a question of public importance—namely, whether the officers had a right to go to and remain on the premises in pursuance of their inquiries.

Mr. Raphael has argued that, in going on the premises, the police officers were not trespassers. I think that it cannot be denied that where you have such premises as there are here—an open garage or, indeed, where you have a shop with an open door—there is an invitation to all persons having business with the owners of the premises to go to the premises and to enter the premises. How far that extends to a police officer who is engaged in making inquiries may be a matter suitable for some debate and discussion. But, considering that in this case it is found that the police officers had seen, first, the lorry which was the subject of the obstruction in the street, and, later, that it had been moved into the garage, I am inclined to think that there was an invitation to the officers to enter the garage. The proprietor had taken into his garage what I may call the corpus delicti with regard to which it was proper for the officers to inquire. Therefore, I think that they could say that they had lawful business with the proprietor.

I will assume, therefore, that the officers, in crossing the threshold of these open premises, were not trespassers, but what followed was an immediate refusal by the garage

1936

DAVIS
v.
LISLE.

Goddard J.

proprietor to give any information and an immediate demand by him to the police to withdraw. The very facts that one of the officers said: "My colleague here is a police officer" and that that police officer, who was in plain clothes, proceeded to get out his warrant card showed, I think, that the officers were claiming a right to stay on the premises. It is putting it rather high to try to make me believe that the appellant in producing his warrant card was producing something which might take the place of a visiting card, and that he would, after introducing himself, there and then turn from the garage proprietor and would say: "Good afternoon, I will go." These officers, being police officers and having seen the offence which had been committed in the street, probably thought that they had a right to stay where they were until they had got some satisfaction. Mr. Raphael said in the course of his argument that if the appellant had not produced his warrant card the appellant would have been justified in turning him out. If Mr. Raphael meant by that that, because he produced his warrant card, the appellant was not justified in turning him out, I do not think that that follows. Whether the respondent produced the card or not, in my judgment makes no difference at all. It makes no difference whether he was or was not a police officer. He had no right to be on the premises once he had been asked to leave. He was not acting in the execution of his duty and, therefore, these first two convictions cannot stand.

Appeal allowed as to first two convictions.

Solicitors for appellant: *Hicks, Arnold & Bender.*
Solicitor for respondent: *Solicitor for Metropolitan Police.*

G. F. L. B.

1936
May 1.

REX *v.* GEE.

REX *v.* BIBBY.

REX *v.* DUNSCOMBE.

Criminal law—Indictment—Committal for trial—Depositions irregularly taken—Effect—Indictable Offences Act, 1848 (11 *&* 12 *Vict. c.* 42), *s.* 17*—Administration of Justice* (*Miscellaneous Provisions*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 2, *sub-s.* 1.

The appellants were charged with shopbreaking. Before the committing justices the depositions were not taken in the manner prescribed by s. 17 of the Indictable Offences Act, 1848, but the witnesses were examined by the chief constable from a typewritten statement which was checked by the clerk and ultimately signed by each witness. Nothing was taken down by the magistrates or their clerk in writing. The defendants were not furnished with copies of the statement. The appellants having been committed for trial and convicted :—

Held, by the Court of Criminal Appeal that the proceedings before the committing justices were so defective by reason of non-compliance with s. 17 of the Indictable Offences Act, 1848, that there was no lawful committal for trial within the meaning of s. 2, sub-s. 2, of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and consequently no bill of indictment could be preferred against the appellants. The document purporting to be an indictment was not an indictment, and the appellants could not be tried upon it.

Held further that, though the trial was a nullity and the Court had jurisdiction to order a proper trial, in view of the time spent by the appellants in custody, the Court would quash the convictions.

APPEALS against conviction.

The appellants Arthur Gee, John Bibby and James Dunscombe, who were convicted at the quarter sessions for the borough of Oldham of shop-breaking and were sentenced by the Recorder to seven months' imprisonment each, appealed against their convictions on the ground that the depositions were not taken by the committing justices in the manner required by s. 17 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42) (1), and that therefore there was no lawful committal for trial, and no indictment could lawfully be preferred against them, having regard to the provisions of s. 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36). (2)

Before the committing justices the witnesses were examined by the chief constable from a prepared typewritten statement, analogous to a proof, copies of which were handed to the magistrates and their clerk. Nothing was taken down by the magistrates in writing, but the prepared statement was checked by the clerk and ultimately signed by each witness. The defendants were not furnished with copies of the statement.

The appellants, having been committed for trial, appeared before the Recorder on January 7, when the objection was taken that the depositions having been irregularly taken there was no committal for trial, and therefore no indictment.

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(1) By the Indictable Offences Act, 1848, s. 17: " In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . . such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same. . . . ."

(2) By the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2, sub-s. 1: " Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a Court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the Court shall, if he is satisfied that the requirements of the next following sub-section have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly. . . . ."

Sub-s. 2: " . . . . no bill of indictment charging any person with an indictable offence shall be preferred unless either—(*a*) the person charged has been committed for trial for the offence; or (*b*) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act 1911."

He adjourned the case to the following sessions, when he decided, on March 13, that he was bound to try the indictment which was before him, notwithstanding the objection which was again taken, and the appellants were convicted and sentenced as above stated.

Bibby-Trevor for the appellants. The depositions were not taken in the manner provided by s. 17 of the Indictable Offences Act, 1848, and there was therefore no lawful committal for trial. [He was stopped.]

Hamwee for the Crown. There appears to have been an irregularity; but it is submitted that the more appropriate remedy is by writ of certiorari, which the appellants were given opportunity to apply for.

The judgment of the Court (Lord Hewart C.J., du Parcq and Goddard JJ.) was delivered by:—

GODDARD J. The three appellants were convicted before the Recorder of Oldham of breaking and entering a shop with intent to commit felony therein. The serious ground of appeal is that the appellants were never lawfully before the court of quarter sessions, because there had been no committal for trial within the meaning of s. 2, sub-s. 2, of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and, therefore, there was no indictment before the court. That question depends on whether the magistrates lawfully committed the appellants for trial. The facts relating to the hearing before the magistrates are the important matter in the case, and they are, in substance, beyond dispute.

It appears that for many years a practice has prevailed at the police court at Oldham under which, when an indictable offence is being investigated, the chief constable first interviews the witnesses, as he is entitled to do, and takes statements from them. Those statements are then typed out in narrative form, and when the prisoner is brought before the magistrates the typed statements are handed to the magistrates. It is not clear exactly what kind of examination takes place in the presence of the prisoner, but it is clear that the provisions of s. 17 of the Indictable Offences Act, 1848, have not been complied with. That Act was passed for the purpose, among other purposes, of introducing uniformity into the practice of magistrates dealing with indictable offences before committal for trial. Before 1848 the practice of different magistrates varied and no uniform principles were applied to the taking of depositions, and it was not possible for a prisoner to obtain a copy of the depositions before trial. One of the objects of the Act of 1848 was to standardize the procedure, and it is of the utmost importance that magistrates should understand that there should be strict compliance with the provisions of the Act. [His Lordship read s. 17 of the Act, and continued :]

It is common ground that the proceedings before the magistrates in the present case were not in accordance with the above Act. What is the effect of that ? [His Lordship read s. 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and continued :] The question here is whether the persons charged have been legally committed for trial. "Committed for trial" is defined in s. 27 of the Interpretation Act, 1889. "The expression 'committed for trial' used in relation to any person shall, unless the contrary intention appears, mean . . . . committed to prison with the view of being tried before a judge and jury, ... and shall include a person who is admitted to bail upon a recognizance to appear and take his trial before a judge and jury." The magistrates purported to commit the appellants for trial by remanding them in custody until trial. It appears to the Court that these proceedings were so defective that there was no lawful committal for trial, and consequently the provisions of s. 2, sub-s. 2, of the Act of 1933 were not complied with and no bill of indictment could be preferred against the appellants. The document purporting to be an indictment which was produced before the Recorder was not an indictment, and the appellants could not be tried on it.

The point was taken before the Recorder on January 7, and he expressed some doubt whether he was not bound to try the indictment placed before him, but he remanded the appellants on bail and gave them the opportunity of moving by certiorari to quash the indictment. They did not take that course, and at the next sessions the same objection was taken before the Recorder. He thought that he could not give effect to it and that he was bound to try the indictment. In the opinion of the Court that was wrong. Though the appellants might have moved by certiorari to quash the indictment, the fact that they did not do so did not make a bad indictment a good one. The Court is of opinion that the objection taken on behalf of the appellants was valid.

The result is that there has been what is sometimes called a mis-trial, though it would be more accurate to say that there had been no trial at all. Under the decision in *Crane* v. *Director of Public Prosecutions* (1) this Court has power to order that a proper trial shall take place, and in that case the proceedings would recommence from the point where they broke down. This Court also has the power in such circumstances, and has acted on it on several occasions in cases where it was held that the interests of justice so required, to quash the conviction and allow an appellant to be discharged. In all the circumstances of the present case the Court is of opinion that that is the proper order to make. The appellants have been in custody for about three months before trial; they were then held to bail for three months, and have been nearly two months more in custody since conviction. If the Court were to order that the proceedings should begin de novo, the appellants would have to go back before the magistrates and be committed again to quarter sessions, which may not be held for some time, and that would be, in the circumstances, oppressive.

For the above reasons the Court has come to the conclusion that the proper order to be made is that the convictions should be quashed.

The Court expresses the hope that magistrates in Oldham and in any other court where a similar practice may have prevailed will in future comply strictly with the provisions of the Indictable Offences Act, 1848. Considering that since

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(1) [1921] 2 A. C. 299.

1933 a committal by magistrates is substituted for a presentment by a grand jury, it is of the greatest importance that there should be no deviation from the requirements of the Statute.

Convictions quashed.

Solicitor for appellants: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. W. H.

APPENDRODT *v.* CENTRAL MIDDLESEX ASSESSMENT COMMITTEE.

1936
May 20.

Rating—Licensed premises—Valuation list—Deduction of monopoly value in estimating gross value—Payment of monopoly value by annual instalments—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 68.

A new on-licence in respect of an hotel was granted to the appellant subject to the payment of 3000*l.* monopoly value made payable by five annual instalments of 600*l.* In fixing the gross value of the premises for the purposes of the valuation list the assessment committee took these annual payments into consideration by way of diminishing their estimate of the rent a tenant from year to year might reasonably be expected to pay:—

Held, that the payment was neither a landlord's nor a tenant's charge but a special statutory charge and was none the less a capital charge because payable by instalments, and that as it was not included in any of the payments enumerated in the definition of gross value in s. 68 of the Rating and Valuation Act, 1925, it must not be taken into account in fixing the gross value.

SPECIAL CASE stated by Middlesex Quarter Sessions under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

At the court of quarter sessions for the county of Middlesex holden at the Guildhall, Westminster, on January 23, 24 and 29, 1936, Hermann Appenrodt (called herein "the respondent") appealed against the decision of the said assessment committee (called herein "the appellants"), upon a proposal by the respondent to amend the entry in the valuation list for the borough of Hendon in respect of the Brent Bridge Hotel which was gross value 2560*l.* and rateable value 2130*l.*

At the hearing the following facts were proved or admitted: The said hotel stood in its own grounds and contained a public restaurant, ball-room and brasserie; it was fully licensed and there were no comparable premises in the neighbourhood.

The respondent was both owner and occupier.

In April, 1932, he was granted a new justices' on-licence in respect of the hotel pursuant to s. 14, sub-s. 2, of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), for a term of five and a quarter years. The justices, pursuant to s. 14, sub-s. 1, of the Act attached to the grant a condition that the respondent should pay, as the monopoly value of the hereditament, a sum of 3000*l.* in five annual instalments of 600*l.* In cases where the occupier of licensed premises is not the owner payments in respect of monopoly value are almost invariably made by the landlord.

Quarter sessions were of opinion that the assessment appealed against was excessive even if the said payments ought not to be taken into account; on that basis the gross value would be 2278*l.* But they were of opinion that the said payments of 600*l.* ought to be taken into account and the gross value reduced to 1860*l.* "on the grounds that although the said payment was a capital sum, in this case it has to be paid by the tenant in annual instalments and therefore was in our opinion an expense necessary to maintain the hereditament in a state to command the rent." They therefore reduced the gross value to 1860*l.* and the rateable value to 1547*l.* The assessment committee appealed.

The question for the opinion of the Court was whether quarter sessions were right as a matter of law in holding that the said annual payments in respect of monopoly value should be taken into account as diminishing the rent a hypothetical tenant would otherwise pay for the said hereditament. If the Court answered in the affirmative their decision was to stand; if not, the gross value was to be increased to 2278*l.* and the rateable value to 1895*l.*

F. J. Tucker K.C. and *Michael Rowe* for the appellants. The decision of quarter sessions was wrong. Sect. 68 of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), defines "gross value" as "the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." Therefore everything, except as indicated in the section, is to be paid by the landlord. But this payment is clearly not a payment necessary to maintain the hereditament in a state to command the rent, for monopoly value, by s. 14, sub-s. 1, of the Licensing (Consolidation) Act, 1910, is the difference between the value of the premises unlicensed and their value licensed, and that means their capital value—per Bray J. in *Rex* v. *Customs and Excise Commissioners* (1)—payment of which is a capital payment which precedes any fixing of rent, and which is ascertained once for all when the licence is applied for—*Rex* v. *Taylor* per Lord Reading C.J. (2) And it is none the less a capital payment because payable by instalments, which was by an arrangement made for convenience, and an accident. This is shown by the fact that if made payable in two annual instalments only it would, on the respondent's reasoning, have extinguished the annual value altogether. This payment does not differ from a payment to make unsuitable premises suitable to be licensed. The word "maintain" in the definition of gross value in s. 68 of the Act of 1925 does not refer to a capital payment; it means to "keep" the premises in a state to command the rent, not to "make" them into that state.

[*Waddle* v. *Sunderland Union* (3), *Rex* v. *Shoreditch*

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(1) [1913] 3 K. B. 483, 489. (2) [1915] 2 K. B. 593, 601.
(3) [1908] 1 K. B. 642, 649.

Assessment Committee (1) and Ryde on Rating, 6th ed., p. 596, were also referred to.]

Maurice Healy K.C. and *Harold Williams* for the respondent. Payment of monopoly value is a payment sui juris and is not comparable with any of the payments enumerated in the definition of gross value in s. 68 of the Act of 1925. It is a capital payment, but not part of the capital value of the premises. Its effect has to be considered in relation to the bargain between landlord and tenant. Rates are paid on the value of the premises to the tenant, that is, what he gets from the landlord. He does not get the benefit of this payment, which goes to the public, the landlord being a mere conduit pipe, therefore he should not have to pay rates on it.

The hypothetical tenant is looking for licensed premises, and such premises cannot be obtained unless monopoly value has been paid, except in the case of pre-1904 premises, which the premises in question are not. That sum can only be earned out of the premises, and, if the landlord has paid it, it will be passed on to the tenant, whose "rent" will therefore include redemption of this payment. In law the payment is by the licensee who, ex hypothesi, is the tenant. If these had been pre-1904 premises they would have been equally valuable to the tenant, who would have obtained them for the rent without any payment of monopoly value. In *Rex* v. *Shoreditch Assessment Committee* (1), where the effect on value of an increased licence duty was discussed, Cozens-Hardy M.R. said (2): "I cannot doubt that the increased duty of 95*l.* must prima facie affect the gross value of the licensed premises: res ipsa loquitur. It is a sum the payment of which is essential to the carrying on of the business of a publican." Channell J. said (3): "One of the chief elements in value of a public-house is the licence: the profitable use to which the premises can be put is dependent on the existence of the licence; and in estimating the amount of such profit as bearing upon the amount of rent obtainable the price to be paid for the licence necessarily comes into consideration;

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(1) [1910] 2 K. B. 859.

(2) Ibid. 876.

(3) Ibid. 882.

a privilege which costs 35*l.* is obviously more valuable than the same privilege when it costs 130*l.*; and when the question is whether the reasonable man will give the same rent for a licensed house the licence of which costs him 130*l.* as he would give for the same house the licence of which costs him 35*l.*, the only possible answer is in the negative." This reasoning applies equally to the payment of monopoly value, which, accordingly, should be taken into account in estimating the value of these premises for rating purposes.

Tucker K.C. replied.

LORD HEWART C.J. This is a special case stated in accordance with the provisions of s. 31, sub-s. 5, of the Rating and Valuation Act, 1925. The question which is involved is, I think, by no means free from difficulty, but, in spite of the ingenious and attractive argument which we have heard from Mr. Maurice Healy, I think that it is clear that this appeal must be allowed.

The point can be quite shortly stated. The Central Middlesex Assessment Committee, who were the respondents to the appeal at quarter sessions, are appellants in this Court. The appellant in the court below was the owner and occupier of a certain hereditament known as the Brent Bridge Hotel in Brent Street, Hendon, and he applied in April of 1932 for a new justices' on-licence in respect of that hereditament. The licence was granted for the term of five years, and it was a condition that the appellant, the owner and occupier, should pay, as the monopoly value of the hereditament, a sum of 3000*l.* by five annual instalments of 600*l.* In the appeal which he made to quarter sessions he contended that the payment of that sum of 600*l.* in respect of monopoly value was the transfer to the public of the additional value added to the hereditament by the licence, and should be treated as one of the normal working expenses of the tenant. He complained, therefore, that his assessment was unduly high and ought to be reduced. The court of quarter sessions came to the conclusion, first of all, that on any view of the matter the assessment was too high and should be reduced to 2278*l.*;

but the court was further of the opinion that this payment under the head of monopoly value ought to be taken into account, and that the gross value of the hereditament ought accordingly to be reduced to 1860*l.*, and the rateable value to 1547*l.*

The question, and the only question, raised by this appeal, which is the appeal of the assessment committee, is whether that view is right in law, and the question is clearly formulated in the case: "The question for the opinion of the Court is whether we were right as a matter of law in holding that the said annual payments in respect of monopoly value should be taken into account as diminishing the rent a hypothetical tenant would otherwise pay for the said hereditament. If the Court answers such question in the affirmative, our decision is to stand. If not, the Court is requested to vary our order by increasing the gross value determined by us to 2278*l.* and the rateable value to 1895*l.*"

Now it seems a little odd at first blush that, although twenty-six years have gone by since the passing of the Licensing (Consolidation) Act, 1910, there is no express authority upon the particular point which is raised by this appeal. I cannot help thinking that one reason, at any rate, for that state of affairs is that it has been generally recognized that the kind of claim which was put forward by this licensee, the owner-occupier, in the court below, is a claim which cannot be sustained. However that may be, on looking at the case which is now presented one finds that the provisions with regard to monopoly value are contained in s. 14 of the Act of 1910, and the vagueness of the terminology which is there employed seems to me to be interesting. By that section it is provided that the licensing justices, on the grant of a new justices' on-licence, may attach certain conditions. Then it is provided: " (*a*) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the

1936

APPENRODT v. CENTRAL MIDDLESEX ASSESSMENT COMMITTEE.

Lord Hewart C.J.

value of the same premises if they were not licensed." The words are, "best adapted for securing to the public any monopoly value." To secure from whom; from what quarter; from what source? The section does not say. The order, which was made the condition that was attached, required that the total monopoly value of the hereditament, a sum of 3000*l.*, should be paid by five annual instalments of 600*l.* In my opinion, that is a mere incident in relation to the matter. It is a mere accident for convenience that the total sum of the monopoly value was distributed over five years; but it is only in that sense that any ingredient of the nature of an annual payment comes in. I say that because it seems possible, from the way in which the justices have stated their opinion, that they were unduly influenced by the mere fact that there was here an annual payment.

What is the true nature of that sum paid or payable as monopoly value? It seems to me that the authorities, which were cited by Mr. Tucker in the course of his argument, leave no doubt upon that point. I need not reiterate them. It was said, for example, in the case of *Rex* v. *Customs and Excise Commissioners* in the considered judgment of Lush J. (1): "I cannot read that section"—that is to say s. 14 of the Act of 1910—"without coming to the conclusion that the sum to be ascertained is the capital sum which represents the monopoly value. I should have thought that, when one speaks of the value which premises either do now bear or will bear when licensed, one refers to the sum which they would realize if converted into money, the market value, the sum which they are worth. One does not naturally think of that in the terms of rent, but in the terms of purchase-money." Again, in the case of *Rex* v. *Taylor and Amendt* (2) one finds in the considered judgment of Lord Reading this passage (3): "The monopoly value must be a definite capital sum ascertained by the justices once for all, and the conditions of payment to secure it must be fixed once for all when the licence is applied for, and before it is granted, and subject only to the power of reduction given to the Commissioners of Customs and Excise under s. 47 of the Finance (1909–10) Act, 1910."

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(1) [1913] 3 K. B. 483, 497.

(2) [1915] 2 K. B. 593.

(3) Ibid. 601.

Now what is it that these justices have found? They have expressed their conclusion, at any rate, with brevity. I am not sure that they have quite clearly expressed what they mean. They say: "We were further of opinion that the said payment"—that is to say, of monopoly value—"ought to be taken into account and that the said gross value ought to be reduced accordingly to 1860*l.* on the grounds that although the said payment was a capital sum, in this case it has to be paid by the tenant in annual instalments and therefore was in our opinion an expense necessary to maintain the hereditament in a state to command the rent." One cannot help thinking that there is something of the nature of a misprint in that sentence. But, to deal with the two elements which it contains, as I have already said, it seems to me to be nothing to the point that in this case the monopoly value was in fact to be paid, or was being paid, in annual instalments. Secondly, when I look at this word "therefore," I wonder what is exactly intended to be conveyed. The justices seem to say: Because in this case this sum of money had to be paid by the tenant in annual instalments, it followed that it was an expense necessary to maintain the hereditament in a state to command the rent. I find it very difficult to follow that reasoning. The last words seem to be an echo of the last words of the definition of "gross value" in s. 68 of the Rating and Valuation Act, 1925. "Gross value," by that definition, "means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." The justices speak of "an expense necessary to maintain the hereditament in a state to command the rent." But if that were the true description, that is a description of the kind of expense or cost which the landlord undertakes to bear, and in mere words the reason which the justices offer for their conclusion contradicts the conclusion for which it is offered. I hesitate to conjecture what was really intended to be conveyed.

If it were, indeed, true that this payment of monopoly value, whether paid by instalments or not, was the payment of an expense necessary to maintain the hereditament in a state to command the rent, that would be an answer to the claim which the appellant successfully made below. In my opinion, however, Mr. Tucker is quite right in not basing his argument upon that foundation, not only because the feature that the payment is to be made annually is in this case accidental, but also because this payment is not of the kind which seems to be covered by the words, "repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." It is quite true that in the passage to which our attention has been directed in the judgment of Vaughan Williams L.J. in *Waddle* v. *Sunderland Union* (1), where he speaks of expense necessary to the accrual of a condition, there is colour lent to the view that an expense of this kind might be such a landlord's charge as would come within this definition. But I cannot believe that anything of that nature was in Vaughan Williams L.J.'s mind.

But what is the nature of this payment of monopoly value? Does it come within those payments which are referred to in the first limb of the definition in s. 68 of the Act of 1925: "If the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any?" In my opinion, this particular payment does not come within that category either; and, indeed, it seems to me that the true conclusion is that this payment is in a class by itself. It is not a tenant's charge; it is not a landlord's charge; it is a statutory charge of a special and peculiar kind. But the one thing that is clear about it is that it is a part of capital value, and in those circumstances it seems to me that it is impossible to hold that the sum should be taken into account by way of deduction

(1) [1908] 1 K. B. 642, 649.

when the question is asked: What would the hypothetical tenant be prepared to pay by way of rent? I think, therefore, that the question which is put to us should be answered in the sense that the court below came to an erroneous conclusion in point of law, and that the order of that court should be varied in the manner indicated in the case—namely, by increasing the gross value determined by that court to 2278*l.*, and the rateable value to 1895*l.*

I think, therefore, that this appeal ought to be allowed and the order of the court below varied in that way.

HUMPHREYS J. I agree in the judgment which has been pronounced by my Lord, and also with the reasons which he has given. For my own part I only desire to add a very few words. The question which we are asked to answer is stated very shortly in the case. It is, whether the court of quarter sessions was right as a matter of law in holding that the annual payment in respect of monopoly value in this case should be taken into account as diminishing the rent the hypothetical tenant would otherwise pay for the hereditament. I come to the conclusion that quarter sessions was wrong in law in so holding, because in my view the monopoly value payable in respect of these premises was not a matter which would affect the rent at which this hereditament might reasonably be expected to let from year to year, that being the definition in s. 68 of the Act of 1925, of "gross value"; and those being, I think, the only important words in the definition of "gross value," I repeat them: "The rent at which a hereditament might reasonably be expected to let from year to year." The following words in that definition clause are an indication that the tenant, who is a hypothetical tenant, not an existing ascertainable tenant, must be assumed to be the ordinary tenant from year to year, that is to say, a tenant who undertakes to pay all usual tenant's rates and taxes and tithe rentcharge, if any, the landlord undertaking to bear all other expenses, that is, the usual repairs, insurance and other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

1936

APPENRODT
v.
CENTRAL
MIDDLESEX
ASSESSMENT
COMMITTEE.

Humphreys J.

In this case I find it very difficult to bring monopoly value into the language of that definition clause. I do not think it can possibly be said that monopoly value is part of the usual tenant's rates and taxes. It certainly is not tithe rentcharge, and I think it is very difficult to say it is an expense necessary to maintain the hereditament in a state to command that rent. I agree with my Lord in thinking that the difficulty which the justices found in this case was due to their failure to appreciate the real meaning of "monopoly value"; and, in addition to the words which my Lord has already read in the case of *Rex* v. *Taylor and Amendt* (1), it may be useful to refer to the case which was the foundation of the law as to monopoly value; I mean it was the case in which it was first authoritatively stated what was monopoly value as created by s. 4, sub-s. 2 (*a*) of the Licensing Act, 1904 (4 Edw. 7, c. 23). The case to which I refer is *Rex* v. *Customs and Excise Commissioners*. (2) In that case the justices had attached to the grant of a new licence conditions providing for certain annual payments to secure the monopoly value, and further providing that those annual payments should be a percentage of each year's gross takings from the sale in intoxicants. It was held that the justices had no jurisdiction to grant licences with such conditions, because those conditions, as was apparent on the face of them, showed that the justices had not fixed a capital sum to represent the monopoly value of the licence, but had made the monopoly value dependent upon the future annual takings; and the Court held that monopoly value could not be an indefinite sum, but must be a sum fixed once and for all when the licence was granted. The question then arose whether monopoly value must be a sum to be paid at once before the licence was granted, and it was held by this Court that so long as monopoly value was fixed as a capital sum to be paid, there was no objection to the payment of that sum being spread over a series of years, which is a totally different thing from the annual payment which is called rent, or payment of rates, or any such matter. That is what the monopoly value fixed in

(1) [1915] 2 K. B. 601. (2) [1914] 2 K. B. 390.

this case was, and Mr. Healy has read to us the actual licence granted, which I think makes it quite clear that the justices granted it originally on a monopoly value of 3000*l.*, neither more nor less; and all that was said about annual payments, which perhaps is not a very happy expression, was that the payment of that sum might be spread over five years by a payment of 600*l.* a year. If that is correct, it seems to me—and it is all I desire to say about this case—that that is a payment made by the person who obtained this licence, which is a payment quite outside and not in the contemplation of the definition of "gross value" to be found now in the Act of 1925, but contained in much earlier Acts; and therefore that the justices were wrong in saying that it was a matter which could be taken into consideration in arriving at the rent which a hypothetical tenant would otherwise pay for the hereditament. In my view the hypothetical tenant, coming to take these premises some time after the licence had been attached to them, would look upon them as licensed premises and would consider what rent he could pay for them, having regard to their situation, the building itself, and matters of that sort; and that he would no more make up his mind what rent he could afford to pay for those licensed premises as the result of consideration of what monopoly value had been paid years before by the person who applied for the licence (who certainly was not himself) than he would consider what was the original cost of the land upon which the house was built, which might be a very material matter to consider from other points of view, but would not be the matter which the tenant would take into consideration in making up his mind what rent he should pay. I therefore agree with the judgment which has been delivered by my Lord.

DU PARCQ J. I agree. No doubt such difficulty as there is in this case arises from the fact that the definition of "gross value," which is now embodied in s. 68 of the Rating and Valuation Act, 1925, was framed at a time when nobody had heard of monopoly value in connection with licensed premises, or at any rate of payments in respect of monopoly value. The words which are now in that section brought the hypothetical tenant into shadowy being; and we have, looking at the position of the hypothetical tenant vis-à-vis the owner of the premises, to look at the hereditament rebus sic stantibus and to ask the question, what would it let for in its present condition?

These are licensed premises. The hypothetical tenant is some one against whose hypothetical character nothing can be said, so that he is in a position to obtain the grant of a licence, or the transfer of a licence. To the grant of the existing licence a condition was attached, that is to say, that a capital sum was to be paid in respect of monopoly value. If in 1937 a new licence is granted, a similar condition is likely to be attached to the grant of that licence. It is not specified by whom the annual payments by which the capital sum is to be paid are to be made; and there is no justification that I can find for the opinion expressed by the justices, that although the said payment was a capital sum in this case it has to be paid by the tenant. There seems to be some confusion of thought there. It has to be paid by Mr. Appenrodt, because he is both owner and occupier, and nobody else could pay it. But it is quite wrong to say that there is anything to indicate that if there were an owner and a tenant it would be necessary that the tenant should pay any part of this capital sum.

I agree that Mr. Tucker was right in refusing to argue that the payment annually of part of the capital sum was an expense necessary to maintain the hereditament in a state to command the rent. If it were in truth an annual payment, I think, for myself, that it might come within those words, but it is not; it is the payment of a capital sum, and that, really, is, I think, the key to this case. Looking at the position of the hypothetical tenant, would it be possible or would it be likely that the owner would say to him: "Here are premises. There is a licence which no doubt will be transferred to you, and when the licence was originally granted it was subject to a payment of 3000*l.*, which is to be paid at the rate of 600*l.* a year, so that there will be a payment of

1936

Appenrodt v. Central Middlesex Assessment Committee.

du Parcq J.

600*l*. a year which you will have to make"? I think that that would be a strange suggestion, and a suggestion which would not be likely to be made or to be acceded to, if it were made, by a tenant from year to year. I think he would say to the landlord: "I am only a tenant from year to year with, at the most, a reasonable expectation that my tenancy may be renewed, and it is absurd to ask me to pay by annual instalments this sum of 3000*l*. or any part of it, which enures for your benefit because it increases the value of your premises and you are enabled to get a higher rent." I think the view that business men on both sides would take would be that the landlord would pay this amount which has to be paid in respect of monopoly value; and in fixing the rent between the landlord and the hypothetical tenant, the fact would be borne in mind that it was the landlord who was bearing that expense. I agree with my Lord and my brother, that one cannot find any direct assistance in the section which defines "gross value," but one does arrive at the true result by remembering the two important facts in this case, first that this is a capital sum which has to be paid, and secondly that the hypothetical tenant is no more than a tenant from year to year.

For these reasons I agree with the judgment which has been pronounced by the Lord Chief Justice.

Appeal allowed.

Solicitors for appellants: *Blundell, Baker & Co.*
Solicitors for respondent: *Rye & Eyre.*

W. L. L. B.

FURNESS WITHY AND COMPANY, LIMITED *v.* DUDER.

1936
April 28.

[1935. F. 1302.]

Insurance (Marine)—Policy on ship—Running down clause—Indemnification of shipowner against damages paid in consequence of collision—Contract between shipowner and Admiralty for use of Admiralty tug—Shipowner to make good all damage to tug—Collision between insured ship and tug caused by negligence of tug—Payment by shipowner to Admiralty for damage to tug—Liability of underwriter to indemnify shipowner—Payment arising from contract and not from tort.

Where, pursuant to the terms of a towage contract between the owners of a steamship and the owner of the only tugs available at a port, the former pay to the latter a sum in respect of damage to a tug resulting from a collision during towage between the steamship and the tug caused solely by the negligent navigation of the tug, the owners of the steamship cannot recover the amount of that sum from the underwriters of a policy of marine insurance on the steamship containing a running-down clause in the usual form, inasmuch as that clause applies only to liabilities arising from tort and not to liabilities arising from contract.

Admiralty Commissioners v. *s.s. Amerika* [1917] A. C. 38, 60, 61, observations of Lord Sumner referred to.

ACTION tried in the Commercial Court by Branson J. without a jury.

The action was tried upon the following agreed statement of facts :—

" The plaintiffs are and were at all material times the owners of the s.s. *Monarch of Bermuda.*

" By a policy of marine insurance dated November 9, 1932, which was subscribed to by the defendant for 15/100ths of 9090*l.* part of 1,000,000*l.* the defendant insured the plaintiffs in respect of the s.s. *Monarch of Bermuda* upon the terms and conditions therein set out including the running down clause.

" On October 30, 1933, the said s.s. *Monarch of Bermuda* was in collision with the Admiralty tug *St. Blazey* in Two Rock Passage, Bermuda. The collision was solely caused by the negligent navigation of the said tug, and resulted in the tug sustaining damage amounting to $579.62, or 119*l.* 12*s.* 8*d.*

" The tug was at the time of the collision under engagement to the plaintiffs on the usual terms upon which Admiralty tugs are engaged from his Majesty's dockyard at Bermuda. These terms are contained in Form D. 461. No other towage assistance was available except other Admiralty tugs which could only have been engaged on the terms contained in Form D. 461.

" The plaintiffs, believing that in consequence of the collision they had become liable to the Admiralty under the said towage contract have paid to the Admiralty the said sum of 119*l.* 12*s.* 8*d.* For the purposes of this action the defendant admits that the plaintiffs did in fact become liable to pay the said sum to the Admiralty under the towage contract, but denies that he is liable under the policy to contribute towards the sum so paid by the plaintiffs.

" If the Court be of opinion that the plaintiffs are entitled under the policy to contribution from the subscribers to the said policy towards the sum so paid by them, the amount of the defendant's contribution is 4*s.* 8*d.*"

The policy of insurance had attached to it a slip containing the running down clause, which was in these terms : " And it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured and/or charterers shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we will pay the assured and/or charterers such proportion of such sum or sums so paid as our subscription hereto bears to the policy value of the ship hereby insured " ; and the slip also contained a clause which provided : " should any clause or clauses in the policy not accord with those in this slip the latter are hereby accepted as binding on both parties."

The towage contract between the plaintiffs and the Admiralty, which was in the terms of Form D. No. 461, provided (inter alia) that the plaintiffs agreed " to make good to the Admiralty all damage suffered by the Admiralty through injury to Admiralty property or any other cause by reason of or arising out of or in any way connected with the service and to indemnify the Admiralty against all liabilities and claims whether in respect of injuries to persons or property or otherwise which may be incurred by or made against the Admiralty by reason of or arising out of or in any way connected with the service and if any claim shall be made by any person whatsoever against any officer or representative or servant of the Admiralty in respect of or arising out of or in any way connected with the service and whether in respect of any breach of duty alleged breach of duty or otherwise and if any such claim shall be satisfied or disposed of by any payment as an act of grace by the Admiralty to indemnify the Admiralty against and to make good to the Admiralty the amount of every payment so made."

A. T. Miller K.C. and *Stephen Furness* for the plaintiffs. The plaintiffs are entitled to recover from the defendant as an underwriter of the policy of insurance on their steamship his proportion of the sum paid by them to the Admiralty under the towage contract. It was only by entering into that contract that the plaintiffs could obtain the necessary towage assistance at Bermuda. By the terms of that contract the plaintiffs were liable to pay to the Admiralty a sum sufficient to make good to the Admiralty the damage to the tug caused by the collision between the steamship and the tug during the towage service, even though the collision was solely caused by the negligent navigation of the tug: see *The President Van Buren* (1); and the plaintiffs duly paid that sum to the Admiralty. The sum so paid by the plaintiffs is a sum which the underwriters of the policy are bound to pay to the plaintiffs, and of which the defendant is accordingly bound to pay his proportion, inasmuch as it is, within the meaning of the running down clause in the policy, a sum which the plaintiffs became liable to pay and paid in consequence of the steamship having come into collision with

(1) (1924) 132 L. T. 253; 16 Asp. M. C. 444.

another ship or vessel, namely, the tug, and which they became liable to pay by way of damages.

H. U. Willink K.C. and *W. L. McNair* for the defendant. The defendant is not liable to the plaintiffs under the policy of insurance for the sum claimed.

The sum which the plaintiffs paid to the Admiralty was paid in discharge of a purely personal liability, and not by way of damages for negligence or any other tort, or even for breach of contract. That sum was paid in pursuance of the towage contract by which alone the plaintiffs were bound to indemnify the Admiralty against cost, damage, and claims arising out of the towage service. The plaintiffs in their points of claim have to allege that the sum paid by them to the Admiralty is a sum which they became liable to pay to the Admiralty under the towage contract which provided that they "agreed" to make good all damage suffered by the Admiralty. If it had been necessary for the Admiralty to sue the plaintiffs for that sum, the action must have been founded on contract and not on tort. Apart from their contractual liability the plaintiffs did not incur any liability in respect of the collision. The collision did not result from any negligence or other tort of the plaintiffs, but was solely caused by the negligent navigation of the tug. The collision may no doubt have been a causa sine qua non of the particular payment made by the plaintiffs to the Admiralty, but the causa causans of the payment was the contractual liability of the plaintiffs under the towage agreement: see per Lord Sumner in *Admiralty Commissioners* v. *s.s. Amerika*. (1) The liability contemplated by the running down clause is of a different nature from that created by the towage contract. That clause insures the shipowner against any sum which he may become liable to pay by way of damages in consequence of the ship having come into collision with any other ship or vessel. Its object is to insure the shipowner against liability for damages in respect of a collision caused by his own negligence. The insertion in the running down clause of the words "by way of damages" appears to be of comparatively recent origin. They would seem to have been introduced as words of limitation for the purpose of restricting the liability of the insurer to damages caused by a collision resulting from the negligence or other tortious act of the insured. They exclude any case of liability which is not by way of damages, and the most obvious case of that kind is a case of contractual liability. The towage contract creates a liability to provide an indemnity for damage however caused: the running down clause creates a liability to insure against damage caused by the negligence of the insured. There is a distinction between an indemnity and damages. An indemnity is a contract securing against loss; damages on the contrary are a recompense for breach of a contract or for tort: *Birmingham and District Land Co.* v. *L. & N.W. Ry. Co.* (1) That being so, a sum paid by the plaintiffs pursuant to their contractual liability under the towage agreement to indemnify the Admiralty against loss by collision, cannot be recovered by the plaintiffs as collision damages under the running down clause in the policy.

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(1) [1917] A. C. 38, 60, 61.

A. T. Miller K.C. in reply. The running down clause rightly construed is sufficiently wide to include the payment made by the plaintiffs under the towage contract. The expression "by way of damages" would appear to have been included in the running down clause from the first and not to have been recently introduced into it: see per MacKinnon J. in *Young* v. *Merchants' Marine Insurance Co.* (2) The presence of that expression in the clause does not limit the clause to a sum paid in consequence of a collision by way of damages, but admits of the clause including a sum paid in respect of a collision by way of contract. The policy is a commercial document, and as the running down clause is inserted in it for the business purpose of protecting the shipowner that clause should be construed as applying to any liability incurred by the shipowner for damages in connection with a collision whether arising from contract or tort. The

(1) (1886) 34 Ch. D. 261, 274, 276.

(2) (1932) 42 Ll. L. 134, 136, affirmed [1932] 2 K. B. 705; 43 Ll. L. 277.

construction of that clause which is proposed by the defendant purports to introduce into it words which it does not contain —namely, the words "by reason of negligence." There is, no doubt, a distinction between a liability to indemnify against a claim and a liability to pay damages; but that distinction is here immaterial, because the towage contract imposes upon the plaintiffs not only a liability to indemnify the Admiralty against all claims arising out of the towage service, but also a liability to make good to the Admiralty all damage arising out of the service. The running down clause insures the plaintiffs against liability for damages in consequence of collision, and under the towage contract the plaintiffs have incurred and paid a liability in respect of damages in consequence of collision.

BRANSON J. This case raises a short point upon an agreed statement of facts. [His Lordship read that statement and continued as follows:] The amount involved is negligible, and the action is brought merely to get the point in issue cleared up. That point, I think, turns entirely upon the wording of the first two lines of the running down clause in the policy of insurance: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured and/or charterers shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum" the underwriters will pay their respective proportions of that sum to the assured. The question here is whether the 119*l.* odd which the plaintiffs have paid to the Admiralty is a sum which, within the meaning of that clause, in consequence of the ship having "come into collision with any other ship or vessel," they become liable to pay "by way of damages."

The argument for the plaintiffs is that, in view of the incident of their having in the circumstances to contract with tugowners for the assistance of tugs under terms which made them as owners of the ship responsible to the tugowners for any damage which the tug might sustain while engaged in towing the ship, or which the tug might do to third persons whilst so employed, these words in the policy are sufficiently wide to cover the damages which they have had to pay to the Admiralty under the contract between themselves and the Admiralty. Mr. Miller urges on behalf of the plaintiffs that the real cause of the payment was the collision, none the less because without the fact that the plaintiffs had entered into the contract the collision would in this instance have given rise to no liability. He says that the collision was an operating cause and the proximate cause of the arising of the liability of the plaintiffs to pay, and therefore that it can correctly be described as the cause in consequence of which the plaintiffs became liable to pay under the running down clause.

In my view that clause must be read as it is written. I do not think it is permissible to divide it into two limbs, and ask oneself first, whether the payment arose in consequence of the collision, and then, whether, if it did so arise, it was or was not a payment by way of damages. To my mind it leads to a clearer apprehension of the meaning of the clause to read it as it is written, in one sentence, and to ask oneself what the parties meant when they said that if the ship should come into collision and the assured should in consequence thereof become liable to pay something by way of damages, the underwriters would indemnify them. What are the circumstances which the parties contemplated? I do not think that any of the cases cited help in any way towards answering this question, unless some support is to be found for the view which I am going to suggest in the observations made by Lord Sumner near the end of his judgment in *Admiralty Commissioners* v. *s.s. Amerika.* (1) His Lordship, however, was there dealing with considerations which are not present in the case before me, and this case must be dealt with as a case of first impression, in which one has to construe the clause and say what one thinks it means without the assistance of any previous decision. Approaching the case from that point of view, I think the clause means that where in consequence of a collision there arises

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(1) [1917] A. C. 38, 60, 61.

1936

FURNESS WITHY & Co. *v.* DUDER.

Branson J.

a legal liability upon the shipowners to pay a sum which can properly be described as damages for a tort, then the underwriters will indemnify them. The expression " become liable to pay . . . . by way of damages " indicates, to my mind, a liability which arises as a matter of tort, and not as a matter of contract.

I do not think I need pursue the matter further, except perhaps to add that if one were to hold that this language in the running down clause was sufficient to cover any sort of liability which a shipowner might undertake by way of contract if and when his ship got into collision, the obligation of the underwriters would, I suppose, only be limited by the pity which the shipowner might be willing to extend to them.

The question, however, as I have said, is what is the real meaning of the clause. I think it means what the defendant says it means, and that this action should be dismissed.

Judgment for defendant.

Solicitors for plaintiffs : *Middleton, Lewis & Clarke.*
Solicitors for defendant : *William A. Crump & Son.*

J. R.

1936
March 19, 20;
April 8.

HOLLYWOOD SILVER FOX FARM, LIMITED *v.* EMMETT.

Nuisance—User of land—Acts done maliciously by defendant on his own land to injure plaintiff in his user of his adjoining land.

The plaintiff company carried on the business of breeding silver foxes on their land. During the breeding season the vixens are very nervous, and liable if disturbed either to refuse to breed, to miscarry, or to kill their young. The defendant, an adjoining landowner, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of injuring the plaintiffs by interfering with the breeding of the foxes :—

1936

HOLLYWOOD SILVER FOX FARM, LD. *v.* EMMETT.

Held, that the plaintiffs were entitled to an injunction and damages, although the firing took place on the defendant's own land, over which he was entitled to shoot.

Keeble v. *Hickeringill* (1706) 11 Mod. 74, 130; 11 East. 574 *n*; *Gaunt* v. *Fynney* (1872) L. R. 8 Ch. 8; *Ibbotson* v. *Peat* (1865) 3 H. & C. 644, applied.

Bradford Corporation v. *Pickles* [1895] A. C. 587 and *Allen* v. *Flood* [1898] A. C. 1 distinguished.

ACTION tried by Macnaghten J.

The following statement of facts is taken from the written judgment. In September, 1934, a Captain Chandler was minded to start business as a breeder of silver foxes, and with that object in view he purchased some twenty acres of land and a small cottage known as "Hollywood Cottage," situate at Kingsdown, in the county of Kent. On taking possession of the property, Captain Chandler erected a number of pens in which to keep the silver foxes, and started business with thirteen vixens and twelve dog foxes.

The property acquired by Captain Chandler is bounded on the north by a public highway called School Lane, and on the north-east by a field, which belonged to the defendant, Mr. Emmett. Captain Chandler erected on his land adjacent to School Lane a notice-board inscribed "Hollywood Silver Fox Farm"; the notice-board was placed in such a position as to be visible not only from School Lane but also from the defendant's field. The defendant, who was about to develop his field as a building estate, and for that purpose had laid out a private road through the middle of the field and divided the land on either side of this private road into plots for bungalows, thought that the notice-board would be detrimental to the development of his building estate. Accordingly, he called on Captain Chandler at Hollywood Cottage and asked him to remove the notice-board from the place where it had been erected. Captain Chandler replied that he saw no reason for removing it. A few days later the defendant called again and repeated his request. The request was again refused, and on that occasion the defendant threatened Captain Chandler that, if the notice-board was not removed, he would during the breeding season shoot with black powder as near as he could get to the breeding pens, "and I guarantee," he said, "you will not raise a single cub."

In December, 1934, Captain Chandler formed the plaintiff company, Hollywood Silver Fox Farms, Ld., as a private company limited by shares under the Companies Act, 1929, with himself as managing director and his wife as the secretary. In the following month the Hollywood Silver Fox Farm was made over to the plaintiff company.

Silver foxes breed once a year between the months of January and May, and during the breeding season the vixens are extremely nervous. Any loud, unusual noise in their vicinity, such as the discharge of firearms, is likely to have a very injurious effect upon them. Such noises may put a vixen off mating for that season, or, if the vixen has mated, may bring about a miscarriage of the litter, or, where she has whelped, may cause her to kill and devour her own young.

In April, 1935, the defendant carried out his threat: he sent his son, a young lad, to discharge a 12-bore gun loaded with black powder at the boundary of his land nearest to the vixens' pens. It was on Tuesday, April 2, at about 6.30 in the evening, when this occurred for the first time. Captain Chandler heard the shots, which greatly disturbed the vixens. He hurried to his boundary and saw the young Emmett walking away. On the three following evenings, April 3, 4 and 5, the young man came again to the boundary and fired his gun. On the last occasion the defendant himself was present, and in reply to Captain Chandler's protest asked him if he intended to remove the notice-board, saying at the same time that he was acquainted with the law, and that he knew he had a right to shoot as he pleased on his own land. On April 4 the plaintiffs' solicitors wrote to the defendant demanding an undertaking to discontinue the discharge of guns near the breeding pens, and the defendant replied to the effect that the shooting was for the purpose of keeping down the rabbits which were injuring his property. Thereupon the plaintiff commenced this action.

At the trial the defendant gave evidence that the field adjoining the plaintiffs' property was over-run with rabbits,

1936

HOLLYWOOD SILVER FOX FARM, LD. *v.* EMMETT.

and that he instructed his son to shoot there for the purpose of keeping the rabbits down, and his evidence with regard to that matter was supported by the son. Other witnesses were called to corroborate his testimony that the rabbits were very numerous, whereas witnesses were called for the plaintiffs who said the rabbits were very scarce. The witnesses called for the plaintiffs as to the number of rabbits were, in my opinion, more worthy of credit than those called for the defendant; but it is not necessary to decide whether the rabbits were numerous or scarce, because I am satisfied that the defendant sent his son to shoot near the breeding pens, not for the purpose of killing rabbits, but for the purpose of frightening the vixens in the breeding pens, and for no other purpose at all. It appears that cartridges which are sold as "bird-scaring cartridges" were used by the young man, and on one of the evenings he came with a companion in a motor-car, and this companion threw a tin up into the air for the young man to shoot at, and he was seen shooting at the tin in the air.

The shooting on those evenings greatly alarmed the vixens, and I am satisfied that the plaintiffs did sustain serious loss thereby, but it is, no doubt, difficult to measure the loss with exactness in money. Although the plaintiffs had no less than thirteen vixens, the number of cubs which were reared on the farm in 1935 was only nine, and it was given in evidence that an average of over two cubs from each vixen would be, as a general rule, the number reared. Captain Chandler stated that, in consequence of the shooting one of the vixens devoured her four cubs, and others did not mate at all, and I accept his evidence with regard to those matters.

J. P. Eddy K.C. and *M. P. Picard* for the plaintiffs. A degree of noise not otherwise actionable may become an actionable nuisance if it is caused maliciously: *Christie* v. *Davey.* (1) *Bradford Corporation* v. *Pickles* (2) decided that motive does not render unlawful that which would otherwise be lawful, but in the case of a nuisance by noise malice is relevant to determine what amount of noise a neighbour may have to bear without remedy: *Harrison* v. *Southwark and Vauxhall Water Co.* (1) In *Keeble* v. *Hickeringill* (2) and *Carrington* v. *Taylor* (3) malice was taken into account in deciding that gun-fire amounted to a nuisance. (See also Salmond on Torts (8th ed.), p. 241.)

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(1) [1893] 1 Ch. 316.

(2) [1895] A. C. 587.

Further, in general, every one owes to his neighbour a duty not to injure him, even by mere negligence (*Donoghue* v. *Stevenson*). (4) A fortiori no one is entitled wilfully to injure his neighbour.

Hon. T. G. Roche for the defendant. Shooting, to the extent here proved, is an ordinary incident of the occupation of land in the country, and does not amount to a nuisance. The plaintiffs cannot, because they carry on a business requiring a greater degree of quiet than ordinary uses of land, prevent the defendant from using his land in a way that would not be a nuisance apart from the special uses to which the plaintiffs put their land. (See *Robinson* v. *Kilvert*. (5)) The defendant denies malice, but even if malice is proved it does not render a lawful act unlawful, so that an action will lie in respect of it. That is the result of *Bradford Corporation* v. *Pickles* (6), which is later in date than any of the cases which appear to support the contrary view, and must therefore be taken as overruling them to that extent.

Cur. adv. vult.

1936. April 8. MACNAGHTEN J. This action, which was tried before me without a jury, was brought by the plaintiffs, Hollywood Silver Fox Farms Ld., to recover damages for nuisance by noise and for an injunction. It raises once again the question, which was debated in the case of *Allen* v. *Flood* (7), whether the decision of the Court of King's Bench in the famous duck decoy case, *Keeble* v. *Hickeringill* (2) was well founded.

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(1) [1891] 2 Ch. 409, 414.
(2) 11 Mod. 74, 130; 11 East. 574 *n.*; 3 Salk. 9; Holt. 14.
(3) (1809) 11 East. 571.
(4) [1932] A. C. 562, 580–1.
(5) (1889) 41 Ch. D. 88.
(6) [1895] A. C. 587.
(7) [1898] A. C. 1.

After stating the facts as set out above, his Lordship continued: In these circumstances the decision of the Court of King's Bench in *Keeble* v. *Hickeringill* (1), if it be well founded, is a clear authority that the defendant has committed an actionable wrong. In that case the plaintiff, the owner of a duck decoy, brought an action against the defendant for shooting at and disturbing the ducks in his decoy. The jury found a verdict for the plaintiff and the question whether the action was maintainable was argued before the full Court.

During the argument there was some question whether the defendant had actually trespassed on the plaintiff's land, and according to the report in 11 Mod., p. 74, Lord Holt said: "But suppose the defendant had shot in his own ground, if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing and a wrong."

The Court decided that the action was maintainable and judgment was entered for the plaintiffs.

Mr. Roche, who put the case for the defendant extremely well, submitted that the defendant was entitled to shoot on his own land, and that even if his conduct was malicious he had not committed any actionable wrong. In support of his argument, Mr. Roche relied mainly on the decision of the House of Lords in the case of *Bradford Corporation* v. *Pickles*. (2) In that case the Corporation of Bradford sought to restrain Mr. Pickles from sinking a shaft on land which belonged to him because, according to their view, his object in sinking the shaft was to draw away from their land water which would otherwise come into their reservoirs. Mr. Pickles, they said, was acting maliciously, his sole object being to do harm to the Corporation. The House of Lords decided once and for all that in such a case the motive of the defendant is immaterial.

In the case of *Allen* v. *Flood* (3) Lord Herschell, commenting on the decision in *Bradford Corporation* v. *Pickles* (2), said: "It has recently been held in this House, in the case of

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(1) 11 Mod. 74, 130; 11 East. 574 *n.*; 3 Salk. 9; Holt. 14.

(2) [1895] A. C. 587.

(3) [1898] A. C. 1, 124.

Bradford Corporation v. *Pickles* (1), that acts done by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned Lords was distinct. The Lord Chancellor said: 'This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it. The statement was confined to the class of cases then before the House; but I apprehend that what was said is not applicable only to rights of property, but is equally applicable to the exercise by an individual of his other rights."

Mr. Roche argued that in the present case the defendant had not committed any nuisance at all in the legal sense of the term, and he referred to the case of *Robinson* v. *Kilvert.* (2) In that case a complaint was made by the tenant of the ground floor of a building that the tenant of the basement was making the basement so warm that the brown paper which he kept on the ground floor suffered damage, and it was held by the Court of Appeal that no actionable wrong had been committed by the defendant, in that the heating was not of such a character as would interfere with the ordinary use of the rest of the house. Mr. Roche submitted that the keeping of a silver fox farm is not an ordinary use of land, and that the shooting would have caused no alarm to the animals which are usually to be found on farms in Kent or done them any harm.

Apart from the case of *Keeble* v. *Hickeringill* (3) there is authority for the view that in an action for nuisance by noise the intention of the person making the noise must be considered. In the case of *Gaunt* v. *Fynney* (4) Lord Selborne, delivering the judgment of the Court, said: "A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree." The parenthetical statement, "supposing

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(1) [1895] A. C. 587.

(2) 41 Ch. D. 88.

(3) 11 Mod. 74, 130; 11 East. 574 *n.*; 3 Salk. 9; Holt. 14.

(4) L. R. 8 Ch. 8, 12.

1936

HOLLYWOOD SILVER FOX FARM, LD.
v.
EMMETT.

Macnaghten J.

malice to be out of the question," clearly indicated that his Lordship thought that in the case of an alleged nuisance by noise where the noise was made maliciously different considerations would apply from those applicable where the defendant had in the words of Lord Holt "occasion" to make the noise. In *Christie* v. *Davey* (1) the plaintiffs, Mr. and Mrs. Christie, and the defendant lived side by side in semi-detached houses in Brixton. Mrs. Christie was a teacher of music, and her family were also musical, and throughout the day sounds of music pervaded their house and were heard in the house of their neighbour. The defendant did not like the music that he heard, and by way of retaliation he took to making noises himself, beating trays and rapping on the wall. The action came on for trial before North J., who delivered judgment in favour of the plaintiffs and granted an injunction restraining the defendant from causing or permitting any sounds or noises in his house so as to vex or annoy the plaintiffs or the occupiers of their house. In the course of his judgment, he said at page 326, after dealing with the facts as he found them, "The result is that I think I am bound to interfere for the protection of the plaintiffs. In my opinion the noises which were made in the defendant's house were not of a legitimate kind. They were what, to use the language of Lord Selborne in *Gaunt* v. *Fynney* (2), 'ought to be regarded as excessive and unreasonable.' I am satisfied that they were made deliberately and maliciously for the purpose of annoying the plaintiffs." Then come the significant words: "If what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the defendant's house to use it for the purpose of vexing and annoying his neighbours."

The case of *Ibottson* v. *Peat* (3) affords an exact precedent for the statement of claim in this action. Mr. Ibottson was a landowner in the parish of Brampton, in Derbyshire, and his land adjoined a grouse moor belonging to the Duke of Rutland. Mr. Ibottson, for the purpose of inducing the grouse on the Duke of Rutland's moor to come on to his own land, put down corn and thereby lured and enticed the grouse to come away from the Duke's land. The defendant, Peat, was, it appears, a gamekeeper in the employ of the Duke of Rutland, and, in order to prevent Mr. Ibottson from getting any benefit from such unneighbourly conduct, he let off fireworks, rockets, and bombs as near as he could get to Mr. Ibottson's land for the purpose of frightening away the grouse which had been attracted by the corn. In answer to the declaration in that case the defendant set up as a plea that he was justified in letting off the rockets and bombs because of the improper conduct of the plaintiff in luring away the Duke's grouse. The question for the consideration of the Court was whether that was a good plea, and it was held to be bad.

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(1) [1893] 1 Ch. 316, 326.
(2) L. R. 8 Ch. 8.
(3) 3 H. & C. 644.

The cases to which I have referred were decided before the decision of the House of Lords in *Bradford Corporation* v. *Pickles* (1); and the question therefore arises whether those cases must now be considered as overruled. It is to be observed that in *Allen* v. *Flood* (2) Lord Watson discussed fully the case of *Keeble* v. *Hickeringill* (3) and said with reference to that case: "No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and if he does so intentionally he is guilty of a malicious wrong, in its strict legal sense."

In my opinion the decision of the House of Lords in *Bradford Corporation* v. *Pickles* (1) has no bearing on such cases as this. I therefore think that the plaintiff is entitled to maintain this action. I think also that in the circumstances an injunction should be granted restraining the defendant from

(1) [1895] A. C. 587.

(2) [1898] A. C. 1, 101.

(3) 11 Mod. 74, 130; 11 East 574 *n.*; 3 Salk. 9; Holt. 14.

committing a nuisance by the discharge of firearms or the making of other loud noises in the vicinity of the Hollywood Silver Fox Farm during the breeding season—namely, between January 1 and June 15—so as to alarm or disturb the foxes kept by the plaintiffs at the said farm, or otherwise to injure the plaintiff company.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Chas. J. Odhams & Sons.*
Solicitor for defendant : *A. J. Larcombe.*

J. W. H.

Distinguished. Houghton-Le Touzel
. Mecca, Ltd. [1950] 1 All E.R. 638.

GREEN *v.* BERLINER AND OTHERS.

1936
Feb. 5, 6.

[1935. G. No. 1043.]

Sunday observance—Place used for public entertainment on Lord's Day—Boxing hall—Claims by common informer for penalties against keeper of place, master of ceremonies, and advertisers—Right to join all defendants in one action—Whether person not actually present can be keeper of place—Whether name on advertisement is proof that person printed it—Judge, whether bound by previous decision of Judge of concurrent jurisdiction—Sunday Observance Act, 1781 (21 *Geo.* 3, *c.* 49), *ss.* 1, 2, 3—*Joinder of defendants—R. S. C., Order XVI., r.* 4.

A place having been used upon the Lord's Day for public entertainment by boxing competitions contrary to the Sunday Observance Act, 1781, and an action having been brought by a common informer against the several persons mentioned below for sums alleged to have been forfeited by them in respect thereof under the Act :—

Held, That a person who was the managing director of the company owning the place of entertainment and had the general management thereof, notwithstanding that he was not actually present at any time during the entertainment, was to be deemed the keeper of the place within the meaning of s. 2 of the Act, and therefore to be the "keeper" thereof within s. 1, and liable as such to forfeit the appropriate sum ;

That a person who at the place and during the entertainment introduced the boxers, gave the verdict at the end of each contest, and supervised the making of a charitable collection acted as "master of the ceremonies" there within the meaning of s. 1 of the Act and was liable as such to forfeit the corresponding sum ;

That a printed handbill containing an announcement of the performances to take place at the entertainment, handed thereat by an attendant to a spectator, which bore at the end of it the name in print of a printing company, was not of itself sufficient evidence to prove that the company was " a person advertising or causing to be advertised " the said entertainment or a " person printing or publishing any such advertisement " within the meaning of s. 3 of the Act.

Tarling v. *Rome* (1936) 52 Times L. R. 220 approved and followed ; and

That a printing and publishing company, which published in a newspaper some days before the entertainment an announcement of a boxing contest to take place thereat, was a person publishing an " advertisement " of the entertainment within the meaning of s. 3 of the Act, notwithstanding that the announcement was published gratuitously as a mere news item.

Where a place has been used upon the Lord's Day for public entertainment contrary to the Sunday Observance Act, 1781, and a common informer claims penalties under the Act from persons whom he alleges to have been the keeper of the place, the master of the ceremonies and advertisers, and, purporting to proceed under R. S. C., Order XVI., r. 4, joins all these persons as co-defendants in the same action, the Court will not in the exercise of its discretion interfere with the joinder, provided that it causes no embarrassment or expense to any of the defendants.

Thomas v. *Moore* [1918] 1 K. B. 555 and *Payne* v. *British Time Recorder Co.* [1921] 2 K. B. 1 applied.

While a judge of the High Court, who is called upon to decide a point of law, should allow great weight to the decision of another judge of that Court in a previous case upon the same point, he is not bound by that decision or relieved thereby from considering the point for himself.

Observation of Bray J. in *Forster* v. *Baker* [1910] 2 K. B. 636, 638, adopted and applied.

ACTION tried by du Parcq J. without a jury.

On June 4, 1935, the plaintiff, Mr. Alfred William Green, brought the present action by specially indorsed writ against the following defendants, namely, Mr. Victor Berliner, sued as general manager of The Ring, Blackfriars Road, London, S.E.1, Mr. John Thomas (" Patsy ") Haygate, sued as master of the ceremonies there, and The Salisbury Press, Ld., and The Fleetway Press (1930), Ld., sued as printers and publishers of advertisements.

By his statement of claim, as indorsed upon the writ, the plaintiff stated that his claim was as common informer under the Sunday Observance Act, 1781, for penalties forfeited by the defendants to him under that Act; the particulars of his claim being that the defendant Berliner described himself on his stationery and otherwise as general manager and matchmaker of The Ring, and was the person within the meaning of s. 2 of the Act who appeared, acted and behaved himself as the master, or the person having the care, government or management of that place, and should therefore be deemed and taken to be the "keeper" thereof within the meaning of s. 1 of the Act, the said place having been opened and used on Sunday, May 5, 1935, for a public entertainment to which persons were admitted by payment of money and by tickets sold for money; and that the defendant Haygate was the person within the meaning of s. 1 of the Act conducting or acting as master of ceremonies at the said public entertainment; and that the defendants, The Salisbury Press, Ld., were persons within the meaning of s. 3 of the Act, advertising or causing to be advertised, or printing or publishing advertisements of that entertainment in the form of handbills, posters and cards for distribution through the post; and that the defendants, The Fleetway Press (1930), Ld., being the printers and publishers of the newspaper Boxing, were persons within the meaning of s. 3 of the Act advertising or causing to be advertised, or printing or publishing advertisements of that entertainment in the form of an announcement in the issue of that newspaper dated Wednesday, May 1, 1935, advertising "Harry Mizler and Robert Disch at The Ring, Sunday"; that these several acts were against the form of the statute: And that the plaintiff claimed from the defendant Berliner 200*l.*, from the defendant Haygate 100*l.*, and from each of the defendant printing companies 50*l.*, these sums being penalties forfeited under ss. 1 and 3 of the Act.

Each of the defendants put in a separate defence.

The defendant Berliner stated in his defence that he denied that he was indebted to the plaintiff in the sum claimed or in any sum; that he denied that he was acting as manager of The Ring on Sunday, May 5, 1935, or that on that date he took any part in the management thereof; that he denied that he was in any way connected with any entertainment that took place there on that date either as general manager or matchmaker or in any other way; that he denied that he described himself on his stationery or otherwise as the general manager or matchmaker thereof for the entertainment that took place on that date; that he denied that he was a person who appeared, acted or behaved on that date as if he were a person having the care, government and management of The Ring; that he denied that he was the keeper or owner thereof on that date or at all; and that he denied each and every allegation in the statement of claim against him or against The Ring.

The defendant Haygate stated in his defence that he denied every allegation against him in the statement of claim; that he denied that he was the person within s. 1 of the Act of 1781, conducting or acting as master of ceremonies at the public entertainment referred to in the indorsement on the writ; and that he denied that he did any act at that entertainment, or, in the alternative, any act for which he was liable to the plaintiff in penalties under that Act.

The Salisbury Press, Ld., stated in their defence that they did not admit that the place known as The Ring was opened or used on Sunday, May 5, 1935, or on any other Sunday for public or any entertainment, or that on the alleged or any date any persons were admitted thereto by payment of money or by tickets sold for money or at all; that they denied that they advertised or caused to be advertised or printed or published advertisements of the alleged or any entertainment in the alleged or any forms for the alleged or any purpose or at all; that they denied that their alleged or any acts were against the form of the said statute or any statute, and further denied that they had forfeited the alleged or any penalty as alleged or at all; and that they made no admissions as to any of the allegations made or contained in the statement of claim against any of the other defendants.

The Fleetway Press (1930), Ld., in their defence made (mutatis mutandis) statements similar to those made in the defence of The Salisbury Press, Ld., and stated further that they did not admit that they were the printers or publishers of the newspaper Boxing; and that if (which was not admitted) they printed or published the issue of a newspaper known by that name dated May 1, 1935, the announcement in that issue referred to in the statement of claim was not an advertisement of the entertainment aforesaid or of any other entertainment within the Act of 1781 or at all.

On behalf of the plaintiff the following witnesses were called and evidence given (1): Mr. E. Tanner produced by authority a letter to the town clerk of the borough of Southwark written on notepaper which had a printed heading containing the words "The Ring. Proprietors Blackfriars Boxing Syndicate, Ltd." and the name "Victor Berliner" in one corner, and signed "Victor Berliner, General Manager," offering facilities for a collection at The Ring for the benefit of the unemployed.

Mr. C. F. Donmall, secretary of the British Boxing Board of Control, stated that Mr. Berliner was licensed matchmaker at The Ring.

Mr. Stone, who went to the entertainment at The Ring on May 5, 1935, saw Mr. Haygate acting as master of the ceremonies by introducing the boxers, giving the verdict at the end of each contest and otherwise, and superintending the collection for the unemployed. An attendant or servant handed to him a printed handbill dated May 5, 1935, and headed "The Ring, Blackfriars. General Manager, Victor Berliner", which contained the programme for the day and had at the foot of it the words "Salisbury Press, Ltd."

On behalf of the defendant Victor Berliner evidence was given by himself, in the course of which he stated that The Ring was owned by the Blackfriars Athletic Syndicate, Ld., and that he was not there on May 5, 1935, but at home through illness from which he had been suffering for some time. In cross-examination he said that he knew of the entertainment on that date, that his name, which had formerly appeared on all the posters, now appeared only on some of them, and that he had sometimes ordered printing from The Salisbury Press, Ld.

On behalf of The Fleetway Press (1930), Ld., its manager, Mr. W. R. Masters, said that that paper had received no pay

(1) The evidence is further dealt with in the judgment of the learned Judge as set out below.

for an announcement of the boxing contest between Mizler and Disch at The Ring on May 5, 1935.

The plaintiff in person: The plaintiff is entitled to recover from each of the defendants the sum claimed from that defendant. Though the plaintiff sues as a common informer he does so under a statute, namely, the Sunday Observance Act, 1781, by which he is not only permitted but invited to bring the action. That Act is no doubt old, but while it remains in force effect should be given to its provisions. The evidence given is sufficient to prove that as regards the public entertainment, consisting of boxing contests, which took place at The Ring on May 5, 1935, the defendants respectively filled the positions and acted in the ways attributed to them in the statement of claim, and are therefore liable under the Act to pay to the plaintiff the sums which he claims from them respectively.

Martin O'Connor and *D. W. O'Connor* for the defendants Berliner and Haygate. The plaintiff is not entitled to succeed in his claim against the defendant Berliner or the defendant Haygate or at all. The action is irregular in form and should be dismissed. The plaintiff relies on different facts and seeks different relief as against each of the four defendants, and, that being so, he cannot, under R. S. C. Order XVI., r. 4, join them all as co-defendants in one and the same action. As regards the merits of the case, none of these defendants is liable to the plaintiff under the Sunday Observance Act, 1781, in the sum claimed from him or any sum. As to the defendant Berliner, he was not the real keeper, within the meaning of s. 1 of the Act, of the place—namely The Ring, which was used for the entertainment in question, and the only way in which the plaintiff can hope to show that that defendant has forfeited to him the sum mentioned in that section is by proving that he acted or behaved himself as the person having the management of that place within the meaning of s. 2, and is therefore to be deemed and taken to be the " keeper " thereof within s. 1. The evidence does not prove that the defendant Berliner was the general manager of the place called The Ring. It may be that it shows that he was the general manager of the proceedings there on behalf of the company to whom the place belonged; but it further shows that on the day of the entertainment in question he was absent therefrom through illness, and therefore was not the manager of that entertainment or acting as such. As to the defendant Haygate, the evidence is not sufficient to identify him as the person who was acting as "master of the ceremonies" at that entertainment.

Cyril Salmon, for the defendants The Salisbury Press, Ld., and The Fleetway Press (1930), Ld. The plaintiff cannot recover the sum which he claims against either the defendants The Salisbury Press, Ld., or the defendants The Fleetway Press (1930), Ld. As to the defendants The Salisbury Press, Ld., the evidence that at the entertainment in question there was handed to a spectator a printed handbill containing an announcement of the entertainment and at the end thereof the name of these defendants in print is not sufficient to prove that these defendants printed the handbill, and therefore is not sufficient to prove that they were within the meaning of s. 3 of the Sunday Observance Act, 1781, persons advertising or causing to be advertised, or printing or publishing advertisements of that entertainment: *Tarling* v. *Rome*. (1) As to the defendants The Fleetway Press (1930), Ld., the evidence that there appeared in their newspaper Boxing some days before the date of the entertainment in question an announcement of a contest which took place at that entertainment is not sufficient to prove that these defendants were, within s. 3 of the Act, persons advertising or causing to be advertised, or printing or publishing advertisements of that entertainment. As no payment was made to these defendants for inserting that announcement it was not an advertisement within s. 3 or at all, but was merely a news item.

DU PARCQ J. This is an action brought by Mr. A. W. Green, suing as a common informer, against Mr. Victor Berliner, Mr. "Patsy" Haygate, The Salisbury Press, Ld., and The

(1) (1936) 52 Times L. R. 220.

Fleetway Press (1930), Ld. He claims that the defendants are indebted to him for sums forfeited under the Sunday Observance Act, 1781, entitled "An Act for preventing certain abuses on the Lord's day called Sunday." I shall have something to say about the particulars of the claim when I deal with the separate cases of the respective defendants.

I may at once dispose of a point as to the joinder of parties which was taken by Mr. Martin O'Connor on behalf of the first two defendants, but which was not adopted by Mr. Salmon on behalf of the other defendants. Mr. O'Connor said that the plaintiff was not entitled to join in one action these four defendants against whom he asked for different relief in the sense that, although he claimed a penalty from each of them, the facts upon which he relied in each case were necessarily different from those relied upon in the other cases. In the Rules of the Supreme Court the order dealing with the joinder of parties is Order XVI. In comparatively recent times a change was made in the rules of that Order, and the tendency of the Courts has been to give a very liberal interpretation to them as they exist at present. Having regard to r. 4, which deals with the joinder of defendants, and to such cases as *Thomas* v. *Moore* (1) and *Payne* v. *British Time Recorder Co.* (2), I think it is plain that when a plaintiff is claiming relief arising out of the same set of circumstances against several persons he may join any number of them as defendants in the action, either jointly, or severally, or in the alternative, the word "severally" meaning that his claims against them are separate claims. If he sought to join several persons as defendants in an action when his claims against them were wholly unconnected and no common question of fact or law arose, the Court would certainly take steps, as it has power to do, to prevent him from proceeding with his action in that form. In this case, however, it cannot be said that the claims against the several defendants are wholly unconnected. Taking the view, as I do, that it is a matter in the discretion of the Court to say whether a joinder shall be permitted or not, and being satisfied that the joinder can

(1) [1918] 1 K. B. 555.

(2) [1921] 2 K. B. 1.

cause no embarrassment or expense to any of the defendants, I think that this joinder should be allowed, and that in short there is no substance in the point raised.

There is one other matter of a technical kind with which I may deal before I leave the pleadings. It was said by Mr. O'Connor, dealing more particularly with the case against Mr. Berliner, that the claim was not properly pleaded, in that it did not comply with the Rules of the Supreme Court in regard to pleadings. I am of the opinion, however, and I have seen no reason in the course of the argument to doubt that it is the correct view, that s. 4 of the Act of 1781, the Act under which these proceedings are taken, is still effective to entitle the plaintiff to sue in the form in which this plaintiff has sued—namely, " to declare that the defendant is indebted to the plaintiff in the sum of —— being the sum demanded by the said action . . . . "

The plaintiff, who has appeared in person, seemed to begin his address to me by some kind of apology, a word which I use rather in its older dictionary meaning than in its more modern meaning. He wished, I thought, to dispel some prejudice which he supposed might exist in my mind against common informers. I should certainly not be doing my duty if I permitted any such prejudice to cause me to lay down any different rule for the conduct of an action by a common informer than would apply in the case of an action by any other person. I have only this to say further about common informers, that, if any one objects to them, there appear to me to be two legitimate ways in which he can get rid of them altogether. One of these is to observe the law so carefully that there will be nothing for common informers to inform about, and the other is to take proper steps to get the law which is regarded as objectionable altered.

The plaintiff was also desirous, as I understood him, of proving that this entertainment was not a form of entertainment which the law ought to be disposed to encourage. I stopped him from adducing any evidence upon that point, because, as I assured him, it was wholly immaterial to any question with which I had to deal. I have not to decide, I am glad to say, whether the entertainments which take place at The Ring are edifying entertainments or the reverse, whether they take place on a Sunday or on a weekday. I express no opinion whatever about that. I deal with this case exactly as I should if the Act had been contravened by the performance of the most classical of concerts or the most improving of stage plays.

He apologized a little too, I thought, for bringing proceedings under an old Act. It is quite immaterial whether an Act which remains in force was enacted last week or a hundred years ago or more. So long as it remains in force it is the duty of the Courts to see that it is observed, so far as their powers enable them to do so, and to assist those who, whatever their motives, are endeavouring to procure its observance. I may perhaps permit myself to say that probably the worst way of seeking to be rid of an Act of Parliament is to act as if it were not there in the hope that it will be ignored by others also, and that it does not appear to me to be the part of a good citizen to break a law which he dislikes even if he has reason to believe that a majority of the population share his dislike of it.

Having disposed of these points I will now deal with the cases against the several defendants, and, first, with the case against Mr. Berliner. It is said that he is by reason of his conduct to be deemed and taken to be the keeper of a place used for public entertainment or amusement on the Lord's day. The place in question is a building known as The Ring in Blackfriars Road, London, where it appears that throughout the week, and once at least on a Sunday, boxing competitions have been held. It was proved that on Sunday, May 5, 1935, a number of boxing competitions were held at The Ring and that money was taken at the doors. The inference I draw from the evidence is that nobody got in without paying, except possibly certain guests, and, I suppose, the representatives of the Press, though I have no evidence about these two classes of persons. The Act provides by s. 1 that any place opened or used for public entertainment or amusement on the Lord's day "and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such . . . . place, shall forfeit the sum of two hundred pounds for every day that such . . . . place, shall be opened or used as aforesaid on the Lord's day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses . . . ." Then by s. 2 the Act goes on to say: "Whereas by reason of the many subtle and crafty contrivances of persons keeping such places as aforesaid it may often be difficult to prove who is the real owner or keeper thereof; be it enacted that any person who shall at any time hereafter appear, act, or behave him or her self as master or mistress, or as the person having the care, government, or management of any such . . . . place as aforesaid, shall be deemed and taken to be the keeper thereof, and shall be liable to be sued or prosecuted, and punished as such, notwithstanding he or she be not in fact the real owner or keeper thereof . . . ." Now, the evidence is this: Mr. Berliner on April 15, 1935, wrote a letter to the town clerk of the borough of Southwark in which he signed himself "For and on behalf of Blackfriars Boxing Syndicate, Ltd.," who are the owners of The Ring, "Victor Berliner, General Manager." The notepaper has a printed heading which contains the words "The Ring, Proprietors Blackfriars Boxing Syndicate, Ltd." Then there is the name of a director in one corner, and in the other "Victor Berliner, to whom all communications should be sent at this address," that address being Blackfriars Road. In that letter the writer said: "In reply to your letter, my directors will be pleased to offer you every facility for a collection at The Ring. Will you please let me know what date would be convenient to you?" Mr. Berliner, who gave evidence, said that that letter referred to a collection which was to be taken for the benefit of the unemployed in the borough. He said that he did not remember on what date it took place, but that it took place in accordance with arrangements made by him, and he said that there was no other collection for the unemployed at any date in or about

April or May, 1935. I am convinced by the evidence of Mr. Stone, who was called for the plaintiff, that on Sunday, May 5, 1935, when he was present and saw a number of boxing competitions at The Ring, after having paid 1*s.* 10*d.* for admission, a collection was taken there for the unemployed, and I have no doubt that that was the collection which had been arranged by Mr. Berliner. I have had produced to me a document which was handed by some servant at The Ring on May 5 to Mr. Stone at his request. It is a handbill containing an announcement of the exhibition to take place on that day. It has upon it the words " General Manager, Victor Berliner " immediately under the words " The Ring, Blackfriars Road." I infer, having heard Mr. Berliner's evidence, that he was not merely general manager of the company who are the proprietors of The Ring, but was, according to ordinary parlance, general manager of The Ring. I am satisfied after hearing his evidence, and that of the witness Donmall, who is general secretary of the British Boxing Board of Control, that Mr. Berliner is what is called matchmaker at The Ring. Some weeks before this handbill was printed he knew of the arrangements and knew what the handbill when printed would contain. He knew what contests had been arranged for May 5. I have no doubt that it is true to say that on that date he was not only appearing, acting, and behaving himself as the person having the management of The Ring, but was the person having the management of The Ring, not in the sense that he was always there and superintending every detail of what went on, but that he was responsible for the management. I accept his evidence without any hesitation that on Sunday, May 5, he was not present at The Ring, because he was ill, or, at any rate, not well enough to be there, and had been ill for some time, but he had not ceased behaving or appearing as manager, and had not, in my view of the facts, ceased to be manager. He says, and no doubt truly, that it did not rest with him to say whether exhibitions should take place or not, because he is subject to a board of directors. I am quite prepared to believe that, if he had said that he refused to have anything to do with arranging for contests on a Sunday or to allow his name to appear as that of general manager on any advertisement which announced contests on Sunday in breach of the law, the consequence might have been—I do not say would have been—that Mr. Berliner would have ceased to be general manager of The Ring; but he does not appear to have said that, or anything like it. He had a hand, I have no doubt, in arranging this very contest. So far as he could act in his absence as general manager, I have no doubt that he was so acting. He permitted himself to be described as general manager on every poster, or, at any rate, on most of the posters at that date, and on many of them, it seems, which were exhibited outside the building, his name appeared as that of general manager, and I have no doubt he was exercising control. I must draw the inference from the evidence that the directors do not do everything themselves. When they have a general manager, I am not making a rash assumption when I assume that his business is to manage generally, and I do not doubt that, if he had sent instructions by telephone or otherwise to The Ring, that the arrangements for this or any other exhibition there were to be modified, those instructions would have been attended to by his subordinates. I do not assent at all to Mr. O'Connor's argument that nobody can ever be dealt with as keeper of a disorderly house unless he is found on the premises when the acts complained of are being committed. Such a doctrine would be most pernicious, as it seems to me, and I see no foundation for it whatever. It is difficult to find any stronger evidence, as I think, that a man is appearing, acting and behaving himself as a person having the management of the place than that he permits his name to appear on all advertisements as that of the person having the management of the place and is in fact cognizant of what is going on. I have come to the conclusion, therefore, that Mr. Berliner was the keeper of this place within the meaning of the Act, and that so far as he is concerned the plaintiff is entitled to the prescribed penalty. There must therefore be judgment against him for 200*l.*

The second defendant is Mr. "Patsy" Haygate. When Mr. Stone went to this entertainment on May 5, 1935, it was not his first visit to such an entertainment. He said that "Patsy" Haygate was the master of the ceremonies at this entertainment and he told me that he had seen him before officiating in a like capacity, I think he said at The Ring. Sect. 1 of the Act, after the words I have already read from it, continues thus : "and the person managing or conducting such entertainment or amusement on the Lord's day, or acting as master of the ceremonies there . . . . shall . . . . for every such offence, forfeit the sum of one hundred pounds . . . ." Mr. Stone told me he was a friend of the plaintiff and that he obtained and kept, in order to assist the plaintiff, the handbill to which I have referred. It is plain that Mr. Stone and the plaintiff knew each other well, and that Mr. Stone was well disposed to the proceedings that the plaintiff has taken. It seemed to me a little curious at first that Mr. Stone should say that Mr. Haygate was acting as master of the ceremonies. It did cross my mind that he might have used the term because it was employed in the Act. I did not know that there was at such an entertainment as this any official who was described as a master of ceremonies. I ventured to say during the argument that I thought that in 1781, when the Act was passed, the term "master of ceremonies" would have called to anybody's mind a place more like the assembly rooms at Bath than an establishment similar to The Ring. When the Oxford Dictionary was consulted as to the meaning of the expression, it appeared that there the citation nearest in date to 1781 was from Jane Austen's novel Northanger Abbey, which referred to the introduction of a gentleman-like young man to a young lady by the master of ceremonies. It appears, however, from the evidence of Mr. Stone that in the boxing world as in the world of which Miss Austen wrote the term "master of ceremonies" is still employed. I am bound to accept that evidence because, although there were many people in court with expert evidence of boxing, nobody was called to contradict it. I take it therefore to be proved that there was somebody at The Ring on Sunday, May 5, 1935, who was carrying out the duties of what is termed in boxing circles a master of ceremonies. It is necessary that I should consider the functions which the person in question was performing. Ceremonies differ very much in different places. There is a ceremonial at The Ring and, so far as there were ceremonies to be performed there, it does appear by the evidence of the witness Stone that there was a person in charge of them, namely, the person whom he described as being Mr. "Patsy" Haygate. He says that that person introduced the boxers in each of the contests which he saw, that he gave the verdict at the end of each contest, and that when the collection was made for the unemployed he was the person who supervised it. In these circumstances it seems to me that the term which those interested in this sport use is quite a proper term, and I do not think that anybody in 1781 would have been surprised to hear the person referred to as the master of the ceremonies. I think it is an appropriate way of describing him, and so, if it was Mr. "Patsy" Haygate, the defendant, who was doing all this, then I think he has brought himself within the words of the Act. Now, is it proved that it was Mr. "Patsy" Haygate who was acting as master of the ceremonies? Having, as a judge of facts, reviewed all the evidence relating to the matter, I am satisfied that it has been sufficiently proved that it was the defendant Mr. "Patsy" Haygate who was acting as master of ceremonies and, therefore, that he is liable for the penalty which is claimed against him, that is to say the sum of 100*l.*

I now come to the case against The Salisbury Press, Ld., who, I think I can say without question, are a firm of printers. They are sued under s. 3 of the Act, which provides that "any person advertising, or causing to be advertised, any publick entertainment or amusement . . . . on the Lord's day, to which persons are to be admitted by the payment of money, or by tickets sold for money, and any person printing or publishing any such advertisement, shall . . . . forfeit the sum of fifty pounds for every such offence . . . ." Upon and at the foot of the handbill to which I have already referred there appear the words: "The Salisbury Press, Ltd., Salisbury and London." The handbill was handed to Mr. Stone in the circumstances which I have already described. There is no other evidence that these defendants printed the handbill, unless, indeed, I am to take into account the fact that Mr. Berliner on being called at a later stage said in cross-examination that The Salisbury Press, Ld., did some printing work for The Ring, but that he did not know whether they printed this particular handbill. In those circumstances the plaintiff says that there is evidence, at any rate, that The Salisbury Press, Ld., printed this handbill, and Mr. Salmon says that either there is no evidence of that at all or no evidence upon which the Court ought to act. It seems a very simple question, but it has given me some occasion for thought. It is very important in all cases, and particularly in criminal cases, or quasi-criminal cases, such as penal actions, that it should never be said to a defendant: "There may not be a case against you, but nevertheless there is evidence which arouses suspicion against you, and if you do not go into the witness-box to deny the charge made against you, that suspicion may harden into a certainty." To allow that to be said would be to cut at the root of a very important principle of English law, which is that before a penalty can be exacted for an offence the case must be proved, and that it is never incumbent upon a person accused to go into the witness-box and prove himself innocent. Anybody who has any experience of administering the criminal law knows quite well that there must be cases where the judge, and probably the jury, think that a man may be guilty, and yet he escapes by reason of the operation of that principle, but none the less it is a principle of English law which very few of those who know anything about its administration would wish to see weakened. Now it is said by the plaintiff that it seems a strong thing to say, when handbills like this are being circulated at The Ring, when the name of the printers is seen upon them, and when it is recollected that by law the printers are bound to put their name upon such handbills, that the fact that the name is there is no evidence at all that those printers in fact printed them. I was referred to a decision of Atkinson J. in *Tarling* v. *Rome.* (1) That was a claim under this very section of the same Act, and in that case an advertisement was put before the learned judge at the bottom of which advertisement were the words "Rome, 27 Great Dover Street, S.E.1." The action was brought against a Mr. C. H. Rome. There were reasons in that case which made it clear, I think, that there would have been some difficulty, apart from the point now being taken before me, in saying that it was proved that the defendant was responsible for that advertisement; but Atkinson J. went on to say: "Another point was that the only evidence that this advertisement had been printed by the firm of Rome was the fact that that name appeared on it. He could not see that in a quasi-criminal case the Court had any right to say that, because the name of a person appeared on a document, the Court ought to assume that that person was the person who printed it. It would be a dangerous doctrine that, merely because a man's name was on an advertisement as the printer, the Court must assume that he was in fact the printer. There was here no evidence that Mr. Rome was the printer except the fact that his name was on the paper." Mr. Salmon very properly relied upon that decision. I suggested to him that it might be a decision rather upon fact than upon the law, but on reflection I think it is fair to regard it as a decision upon the law of evidence. Atkinson J. decided, and it was one of the grounds upon which he based his judgment, that where all the evidence against a printer is that his name appears on a printed advertisement, the Court ought not, as a matter of law, to find upon that evidence alone that he is proved to be the printer. I should like merely to say that I am bound by Atkinson J.'s decision and need consider the matter no further; but I do not think that I can say that. Bray J. in the case of *Forster* v. *Baker* (2) said: "I have always understood that one Judge is not bound by the decision of another Judge on a point of law at nisi prius, and, therefore, I think I am bound to consider the case and to decide it according to my

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(1) 52 Times L. R. 220.

(2) [1910] 2 K. B. 636, 638.

1936

GREEN
v.
BERLINER.

du Parcq J.

own opinion, at the same time, of course, giving great weight to the decision of Darling J.," who happened in that case to be the judge who had dealt with the same point shortly before. I must be guided by the same view of my duty as was expressed by Bray J. I have therefore carefully reconsidered the point that Atkinson J. considered, and I am bound to say that the more I consider the point, the more I am convinced that Atkinson J. was right. It is very tempting to say that probably The Salisbury Press, Ld., whose name appears on this handbill, really were the printers of it, but I am bound by the rules of evidence, and the question is: What evidence is there that they printed it? The handbill contains a statement that it is printed by The Salisbury Press, Ld. That statement is conclusive against The Salisbury Press, Ld., if they made it, but you do not show that they made a statement incriminating themselves by showing that somebody made a statement which would incriminate them if they made it, and if one looks at the document alone and no other evidence it is only by arguing in a circle, as it seems to me, that one can possibly say that it proves anything against them. Supposing a letter had been written in the clearest terms saying that these defendants admitted that they were the publishers of this handbill, that would have been conclusive evidence against them if it was shown that some one duly authorized by them had signed it. It would, however, have been of little avail to produce a typewritten letter to that effect having a typewritten signature without any proof that the writing of the letter or of the signature had been authorized by the company. Then it is said, and I thought at one time there might be something to be said for that view, that it might be presumed that those responsible for the management of The Ring would not have lent themselves to deceit by circulating handbills with the name of printers on them who had not in fact, as they must have known, printed the handbills. But there is a short answer to that argument, as it seems to me, namely, that The Salisbury Press, Ld., cannot be convicted either by the words or by the actions of other persons for whom they are not responsible. One may test it in this way: Supposing that these defendants and another person were being tried together on a criminal charge and it was proved that some person in authority at The Ring had said "This handbill was printed by The Salisbury Press, Ld.," that evidence, if admitted as relevant to some issue against that other defendant, would not be admissible against The Salisbury Press, Ld., and it would be necessary to tell the jury that in considering whether there was evidence against The Salisbury Press, Ld., they must disregard it. That being so, I cannot think that any conduct on the part of the authorities at The Ring really affects the matter. Even if I ought to pay attention to the evidence of Mr. Berliner on this point, it carries the matter no further, because he is not able to say they gave orders for the printing of these handbills to The Salisbury Press, Ld., and in those circumstances I think that even taking that evidence into account I am bound to say that it has not been proved before me that The Salisbury Press, Ld., printed this handbill. I do not think any other plaintiff in a similar case need feel that such a decision unduly hampers him, because there would be very little difficulty, I should think, in finding appropriate means of proving that a particular printer printed a handbill of this kind, if, indeed, the fact be that he did print it. The Salisbury Press, Ld., will therefore be entitled to judgment against the plaintiff.

That brings me to the case of The Fleetway Press (1930), Ld. Mr. Salmon admitted that they are the printers and publishers of a newspaper called Boxing. They are sued under s. 3. which I have already read. There is no dispute about the facts. On May 1 there appeared on p. 11 of the paper Boxing, under the heading "Here and There," a number of items announcing contests to take place on "Thursday," "Friday," "Saturday," and so on, and I rather think it was suggested that that might mean "last Thursday," "Friday," and "Saturday," or some Thursday, Friday, and Saturday in the distant future. I do not think, however, that it can really be doubted as to any of these announcements that they were referring to the next Thursday, Friday and Saturday after the

1936
GREEN
v.
BERLINER.
du Parcq J.

publication of the newspaper. I fully accept the statement of the witness who represented the newspaper that no payment was received by the paper for any of those announcements, but that they were inserted with the motive of providing news for the readers and satisfying their very natural desire to know when and where they would be able to see boxing contests. The main question is, are the announcements advertisements ? Now, to advertise I think is to call attention to something by a published announcement. That is substantially the definition which was read to me from the Oxford Dictionary, and I think it is correct and applicable to this case. I think that any public announcement which calls the attention of the public to some forthcoming event is an advertisement of that event. Difficult cases may arise. I was asked to consider the case of a person with a strong dislike for Sunday entertainments who, to give vent to his disapproval of them, mentioned in some article which he wrote that there would be some such entertainment on a future Sunday. I will only say about that case that when it comes before me I shall consider it and decide upon it. Meanwhile I have not the slightest doubt that each of these announcements was an advertisement of an entertainment, and that the announcement in question here, " Harry Mizler and Robert Disch at The Ring, Sunday," was an advertisement of that entertainment, and that it referred to Sunday, May 5. When once one sees that it is an advertisement I do not think it is at all necessary to show that the person printing and publishing it received payment for it. That, I think, is quite immaterial. It would be very astonishing if somebody who for money advertised an illegal entertainment should be punished while somebody who gratuitously advertised it escaped altogether. If intention is material, as it may be, then I have no doubt at all that the intention of the proprietors of this newspaper, or the editor, or whatever person was responsible directly for inserting this announcement, was to advertise the entertainment. His motive, as I have said, was to let his readers know what entertainments were going to take place, and in order that they might know he intended to advertise the entertainments. He desired to let his readers know that they could go and watch an illegal entertainment at The Ring on Sunday, May 5. It may not have been present to his mind that it was an illegal entertainment, but he is taken to know the law and to intend the natural and reasonable consequence of his acts ; so I have no doubt that, if intention is material, the intention was to advertise. Some point was taken upon the wording of the particulars of claim against the third and fourth defendants. I will only say that it seems to me that the Particulars of Claim show plainly the nature of the complaints against these defendants and that nobody could have been misled by any grammatical inaccuracy in them. The Fleetway Press (1930), Ld., must pay a penalty of 50*l*.

Judgment accordingly.

Solicitors for the first and second defendants : *Edmond O'Connor & Co.*

Solicitors for the third and fourth defendants : *Isadore Goldman & Son.*

J. R.

PETERBOROUGH ROYAL FOXHOUND SHOW SOCIETY *v.* COMMISSIONERS OF INLAND REVENUE.

1936
March 20,
26, 31.

Revenue—Income Tax—Society to promote interests of foxhound breeding —Annual foxhound show—Society to promote interests of live-stock breeding—" Agricultural society "—Charitable society—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37—*Finance Act*, 1921 (11 & 12 *Geo.* 5, *c.* 32), *s.* 30—*Finance Act*, 1924 (14 & 15 *Geo.* 5, *c.* 21), *s.* 23—*Finance Act*, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 24.

The appellant society was founded to promote the interests of foxhound breeding, and for that purpose held annually a foxhound show :—

Held, first, that the society was an agricultural society within the meaning of s. 23, sub-s. 2, of the Finance Act, 1924, being established for the purpose of promoting the interests of live-stock breeding, and that therefore under sub-s. 1 the profits of the show were exempt from income tax.

1936

Peterborough Royal Foxhound Show Society *v.* Inland Revenue Commissioners.

But *held*, further, that the society was not a charity within the meaning of s. 37 of the Income Tax Act, 1918, or s. 30 of the Finance Act, 1921, as amended by s. 24 of the Finance Act, 1927, not being a trust "for other purposes beneficial to the community" in the fourth category of "charities" stated by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* [1891] A. C. 531, 583, and was therefore liable to income tax on its other profits.

Case stated by the Special Commissioners of Income Tax.

At a meeting of the commissioners on April 17, 1935, the appellants, the Peterborough Royal Foxhound Show Society, appealed against assessments to income tax under Sch. D for the year ending April 5, 1935, in respect of profits and gains and interest on War Loan. The ground of the appeal was that the society was a charity under s. 37 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), and s. 30 of the Finance Act, 1921 (11 & 12 Geo. 5, c. 32), as amended by s. 24 of the Finance Act, 1927 (17 & 18 Geo. 5, c. 10). Alternatively, the society claimed exemption under s. 23 of the Finance Act, 1924 (14 & 15 Geo. 5, c. 21), which exempted from taxation the profits arising to an agricultural society from an exhibition or show held for the purposes of the society if applied solely to the purposes of the society. Sect. 23, sub-s. 2, of the last-named Act defines "agricultural society" as "any society or institution established for the purpose of promoting the interests of . . . . live-stock breeding."

The society's object was to promote the interests of foxhound breeding in the United Kingdom, and for that purpose to hold annually a foxhound show at Peterborough open to hounds from any recognized pack in Great Britain, Northern Ireland and the Free State, various prizes being awarded. The land upon which the shows were held was owned by trustees on behalf of the society absolutely.

The whole of the funds and income of the society, including the net proceeds arising from the foxhound show, were applied solely to the promotion of the purposes of the society, and upon a winding-up of the society the surplus assets were to be applied to such charitable purpose as the committee should appoint. The society did not seek either from the foxhound show or otherwise to make a profit, but desired to cover its expenses by its receipts. If and when a profit was made, such profit had never been and under the constitution and rules could not be distributed among the members of the society for their own use and benefit.

Under s. 11 of the Finance Act, 1923 (13 & 14 Geo. 5, c. 14), relief is given from entertainments duty on payments for admission to an entertainment provided by a society which is established for the promotion of the interests of any industry. By sub-s. 2: "industry" is defined as including agriculture, and "agriculture" is defined as including live-stock breeding, and "live-stock" is defined as including animals of any description. Under this section the society had been given relief.

Evidence was given that it was the object of the War Office to acquire annually in this country a large number of light horses. The breeding of such horses was stimulated by foxhunting, which in its turn depended upon the breeding of foxhounds.

It was contended by the society that its sole object being the improvement of animals useful to mankind it was a charity. Further or alternatively that it was an agricultural society established for promoting the interests of live-stock breeding within the meaning of the said s. 23 of the Finance Act, 1924.

For the respondents it was contended that the society was not a charity, and that foxhounds were not live-stock, and consequently that the society was not an agricultural society.

The commissioners held that the society was not a charity and that it was not an agricultural society.

The society appealed, and this case was stated.

The arguments sufficiently appear in the judgment.

J. Millard Tucker K.C. and *W. K. Carter* for the appellants.
Sir Donald Somervell A.-G and *R. P. Hills* for the Crown.

1936. March 31. LAWRENCE J. read the following judgment: The first question I have to decide is whether the appellant society is exempt from income tax on the profits of its show by reason of s. 23 of the Finance Act, 1924, which, by sub-s. 1, provides that profits arising to an agricultural society from a show held for the purposes of the society shall, if they are applied solely to the purposes of the society, be exempt from income tax, and by sub-s. 2 defines an agricultural society as one " established for the purpose of promoting the interests of agriculture, horticulture, live-stock breeding or forestry." By its constitution, the purpose of the appellant society is to promote the interests of foxhound breeding, and the only question on this branch of the appeal is whether foxhound breeding is " live-stock breeding " within the meaning of s. 23. In my opinion it is. The words " live stock " are ordinarily and properly used in contrast with dead stock and include all live animals and birds the breeding of which is regulated by man. In Murray's Dictionary, the only one to which my attention was called, the words are defined as " domestic animals generally; animals of any kind kept . . . . for use or profit." They are defined in the Finance Act, 1923 (13 & 14 Geo. 5, c. 14), s. 11, sub-s. 2, for the purpose of exempting live-stock shows from entertainment duty, as including " animals of any description," and they are used in a somewhat similar sense in the Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 12, sub-s. 6, ss. 35, 36 and 57.

It was contended for the Crown that the words ought to be construed, in view of their context, in accordance with the maxim Noscitur a sociis, as referring only to animals whose use is an integral part of agriculture, horticulture or forestry. But such an interpretation would exclude many animals which are bred in the ordinary course of agriculture and shown throughout the country; for example, town and van horses, hackneys, hunters, racehorses, most breeds of dogs, and fur-bearing animals. I see no reason why the words should receive this limited interpretation, particularly as it was the will of the Legislature that such societies should be exempted from entertainments duty.

The second question is whether the appellant society is exempted from income tax under s. 37 of the Income Tax Act, 1918, on the ground that it is established for charitable purposes only. It was contended for the Crown, though but faintly, that the question is one of fact and that the commissioners' finding is binding upon me; but as I read the decisions upon this subject, it is for the commissioners to say what are the purposes of the society, and for the Court to decide as a matter of law whether those purposes are charitable. The only finding of fact in the case as to the object of this society is that it is to promote the interests of foxhound breeding.

The appellants seek to bring their society within the fourth category stated by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (1) on the ground (inter alia) that fox-hunting is good for the community at large because it keeps money in the country and brings it into the countryside, and also good for officers in the army and those who take part in it, and that it makes for the well-being of animals, which is for the benefit of the community.

Though I am firmly convinced of the truth of these propositions of fact, I am unable to take the view that the appellant society is established for charitable purposes only. It has, I think, been authoritatively laid down that Lord Macnaghten's fourth category must be tested by reference to the subjects mentioned in the Statute of Elizabeth (43 Eliz., c. 4, repealed by 51 & 52 Vict., c. 42, s. 13 and Schedule) itself: see *In re Macduff*. (2) Adopting this method of interpretation, I can see no satisfactory analogy between a foxhound show and the matters referred to in the Statute of Elizabeth. The difficulty in this class of case arises principally from the mixture of motives or purposes which appear to exist in the minds of founders of such societies. A society may be established with an immediate direct but incidental motive or purpose which is not charitable; for example, to promote the sports of a particular regiment, but with an ultimate indirect but main purpose which is charitable, and in that

(1) [1891] A. C. 531, 583.

(2) [1896] 2 Ch. 451, 467.

1936

PETERBOROUGH ROYAL FOXHOUND SHOW SOCIETY *v.* INLAND REVENUE COMMISSIONERS.

Lawrence J.

case it comes within the exemption: see *In re Nottage* (1) per Lopes L.J.; *Inland Revenue* v. *Yorkshire Agricultural Society* (2) per Rowlatt J., and in the Court of Appeal (3) per Atkin L.J.; *General Medical Council* v. *Commissioners of Inland Revenue* (4) per Sargant L.J., and per Lord Haldane in *Attorney-General* v. *National Provincial Bank.* (5) Similarly, in the *Yorkshire Agricultural Society's* case (2), the benefit of members and, as I think, the hound show, were incidental purposes, agriculture being the main purpose.

The question then, in my opinion, is whether the society's main or dominant purpose is charitable. In the present case I am of opinion that the main purpose of the appellant society's activities is to benefit foxhunting, not to benefit the community. The case most favourable to the appellants' contention is the *Yorkshire Agricultural Society's* case. (2) There agriculture was held to be the main purpose of the society and was considered to be directly beneficial to the community, whereas here foxhunting cannot, in my opinion, be said to be directly beneficial to the community. At any rate, foxhunting is not, in my opinion, analogous to the subjects mentioned in the Statute of Elizabeth, and I therefore hold that the appellant society is not established for charitable purposes only.

The appeal will be allowed in part with reference to the live-stock breeding point, and the appellants are entitled to their costs, as they had to appeal in order to succeed.

Solicitors for appellants: *Field, Roscoe & Co., for Batten & Whitsed, Peterborough.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1895] 2 Ch. 649, 656.

(2) (1927) 13 Tax Cas. 58, 66.

(3) [1928] 1 K. B. 611, 631; 13 Tax Cas. 58, 77.

(4) (1928) 13 Tax Cas. 819, 849.

(5) [1924] A. C. 262, 267.

W. L. L. B.

DODWORTH (H.M. INSPECTOR OF TAXES) *v.* DALE.

1936
May 12, 13.

Revenue—Income tax—Personal allowance—Married man—Wife living with or wholly maintained by him—Decree of nullity—Additional assessments on difference between single and married man's allowances—Marriage not void for all purposes—Completed transactions not to be reopened—New facts coming into existence after year of assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 125—*Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 18, *sub-s.* 1.

By the Finance Act, 1920, s. 18, sub-s. 1: "The claimant, if he proves that for the year of assessment he has his wife living with him, or that his wife is wholly maintained by him during the year of assessment, and that he is not entitled in computing the amount of his income for that year for the purposes of the Income Tax Acts to make any deduction in respect of the sums paid for the maintenance of his wife, shall be entitled to a deduction."

In 1921, a marriage between the respondent and Kathleen Richards, spinster, was solemnized. From 1921 to 1932, the respondent, having declared in the income tax returns made by him that he had his wife living with him or that his wife was wholly maintained by him during the years of assessment, was granted the statutory allowances applicable to a married man during those years. In 1933, the respondent obtained a decree of nullity of the marriage by reason of the incapacity of his wife to consummate the marriage. In 1934, on the application of the inspector of taxes, additional assessments were made under s. 125 of the Income Tax Act, 1918, on that portion of the personal allowance obtained by the respondent in each of the five years ending and including 1932–33 in excess of the personal allowance which would have been due to the respondent if he had been an unmarried man. The General Commissioners discharged the additional assessments, holding that for the purposes of income tax assessment the marriage of the respondent subsisted until the decree of nullity was made final and that the personal allowances which had been granted to the respondents had been rightly granted:—

Held, (1.) that a marriage which was null on the ground of the incapacity of one of the spouses was voidable and not void; but when the decree of nullity made it void, it was void ab initio. It was not, however, void for all purposes. Transactions which had been concluded and things which had been done during the period of the supposed marriage, could not be undone or reopened after the marriage had been declared null and void; (2.) that s. 18 of the Finance Act, 1920, ought to be read as applying to a wife who was de facto a wife living with her husband and whose marriage had not yet been avoided; and (3.) that the Revenue authorities had no power to make fresh assessments on the respondent with reference to the years 1928 and following years by reason of a fact which came into existence after those years. In this case the fact which came into existence after the years of assessment was the respondent's decision to exercise his option to avoid the marriage.

Therefore the additional assessments were rightly discharged by the General Commissioners and the appeal must be dismissed.

CASE stated by the General Commissioners of Income Tax.

At a meeting of the Commissioners held on May 16, 1935, Mr. B. J. Dale (hereinafter called the respondent) appealed against additional assessments to income tax made on him under s. 125 of the Income Tax Act, 1918 (1), in respect of allowances obtained by the respondent in the first assessments made under Sch. D for the years 1928–33 inclusive not authorized by the Income Tax Acts :—

1928–29	90*l.*
1929–30	90*l.*
1930–31	90*l.*
1931–32	50*l.*
1932–33	50*l.*

The facts material to the appeal were agreed. On October 22, 1921, a marriage between the respondent and Kathleen Richards, spinster, was solemnized at All Saints' Church, Marylebone.

In the years from 1921 to 1932, both inclusive, the respondent, having declared in the income tax returns made by him that he had a wife living with him or that his wife was wholly maintained by him during the years of assessment, was granted the statutory personal allowances applicable to a married man during those years.

On April 3, 1933, at the suit of the respondent, a decree nisi of nullity of the marriage was pronounced in the High Court of Justice by reason of the incapacity of the respondent's wife to consummate the marriage. The decree nisi was made final on October 23, 1933. On October 22, 1934, on application

(1) By the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 125 : " (1) If the surveyor discovers . . . . that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorized by this Act, then and in every such case " the surveyor might make or have made an additional assessment.

made by H.M. Inspector of Taxes, the additional commissioners made first additional assessments on the respondent as follows :—

1928–29	90*l.*
1929–30	90*l.*
1930–31	90*l.*
1931–32	50*l.*
1932–33	50*l.*

Those additional assessments represented that portion of the personal allowance obtained by the respondent in each of those years of assessment in excess of the personal allowance due to the respondent if he had been an unmarried man.

It was contended on behalf of the respondent that : (1.) until the decree of nullity of April 3, 1933, the respondent was liable for all the contractual obligations of the marriage ; (2.) the respondent was liable to support and in fact supported his wife ; (3.) until the decree was made final the marriage was not void ab initio but voidable ; (4.) the marriage was good in law, and the contract continued until its nullity was declared ; (5.) the respondent was a married man with a wife living with, and wholly maintained by, him from the date of marriage until April 3, 1933.

H.M. Inspector of Taxes contended (inter alia) : (1.) that during the years in question the appellant was not married and was not entitled to the allowances applicable to a married man living with his wife or supporting his wife ; (2.) that the additional assessments in question were correct and should be confirmed.

The Commissioners decided that for the purposes of income tax assessment the marriage of the respondent subsisted until October 23, 1933, and that the personal allowances had consequently been rightly granted. The Commissioners discharged the additional assessments, and, in due course, stated this case under s. 149 of the Income Tax Act, 1918.

The final decree of nullity, dated October 23, 1933, was as follows :—

Dale against Dale otherwise Richards. Referring to the

1936

DODWORTH
v.
DALE.

decree made in this cause on April 3 1933 whereby it was ordered that the marriage in fact had and solemnized on October 22 1921 at All Saints Church Margaret Street Marylebone in the County of London between Benjamin James Dale the petitioner and Kathleen Dale otherwise Richards (then Richards, spinster) the respondent be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever by reason of the incapacity of the respondent to consummate the marriage and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent unless sufficient cause be shown to the Court why the said decree should not be made absolute within 6 months from the date of the said decree—and no such cause having been shown the Court on application of the said petitioner by final decree pronounced and declared the said marriage to be and to have been absolutely null and void and that the said petitioner was and is free from all bond of marriage with the said respondent.

H.M. Inspector of Taxes appealed.

Sir Terence O'Connor S.-G., *Hon. Victor Russell* and *Reginald Hills* for the appellant. By s. 18 of the Finance Act, 1920 (1), the claimant, if he proves that for the year of assessment he has his wife living with him or that his wife is wholly maintained by him, subject to the conditions therein mentioned, shall be entitled to a deduction. The respondent was granted the personal allowance as a married man, in respect of each year of assessment, on proof that he had his wife living with him. The question is whether the respondent's marriage was void ab initio or was merely voidable. It is submitted that the effect of the decree of nullity declaring the marriage null and void by reason of the wife's incapacity to consummate the marriage was that the supposed marriage was no marriage at all and that the respondent's de facto wife was not his wife for the purposes of s. 18 of the Finance Act, 1920. The

(1) Sect. 18, sub-s. 1, of the Finance Act, 1920, is set out in the headnote.

ecclesiastical lawyers in the early part of last century took the view that where there was a breach of the marriage the marriage was void, but where the marriage was annulled by reason of impotency it was voidable. See *Norton* v. *Seton* (1); *Briggs* v. *Morgan*. (2) In *Newbould* v. *Attorney-General* (3) Lord Merivale P. held that a decree of nullity on the ground of impotence had a retrospective operation, so that there was in fact no marriage, although the right to complain might be lost by reason of the conduct of the party complaining. In *Napier* v. *Napier* (4) Pickford L.J. pointed out that in granting a decree of nullity or divorce a vinculo the Ecclesiastical Court did not consider that it was dissolving a marriage, but only proclaiming or declaring a nullity which already existed. Lord Cozens-Hardy M.R. used similar words in his judgment in that case. (5) The order of the Court itself pronounced the husband " to have been and to be free from all bond of marriage." *In re Wombwell's Settlement* (6) a decree was made declaring the marriage to be and to have been absolutely null and void, and it was held that the settlor was absolutely entitled, as a result of the decree, to the settled trust funds, under an express trust in his favour. During the continuance of the marriage there was an irrebuttable presumption of marriage, but as a result of the decree there " was never a marriage at all, although, no doubt, it is recognised as valid until one of the parties to it takes proceedings to annul it." Per Russell J. in *In re Wombwell's Settlement*. (7)

The difficulty created by a decree of nullity is not confined to s. 18 of the Act of 1920. Cases of supertax are also affected. So also are cases where the wife's income is deemed to be the income of her husband, as in r. 16 of the Rules applicable to all Schedules under the Income Tax Act, 1918; *In re Ward*; *Harrison* v. *Ward*. (8) The Judicature Act, 1925, s. 192, contains express powers to investigate settlements with a view to variation in cases of nullity. Before 1925, the Court

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(1) (1820) 3 Phill. 147, 161.
(2) (1820) 3 Phill. 325.
(3) [1931] P. 75.
(4) [1915] P. 184, 189.
(5) Ibid. 186.
(6) [1922] 2 Ch. 298.
(7) Ibid. 306.
(8) [1922] 1 Ch. 517

1936

DODWORTH
v.
DALE.

was asked to read words into the settlement to give effect to it. *Dormer* v. *Ward.* (1) That section provided a remedy, which, until then, had not existed, the decree having abolished the marriage: *Sharpe* v. *Sharpe.* (2) In *Inverclyde* v. *Inverclyde* (3) Bateson J. held that a decree of nullity on the ground of impotence was a judgment in rem altering the status of the parties, and that it dealt with a marriage which, until the decree, was voidable, and not void. He held that the decree was in substance a decree for the dissolution of the marriage and was to be distinguished from decrees annulling marriages for illegality or informality. But that judgment was contrary to the views of ecclesiastical lawyers, and contrary also to the decision of the Court of Appeal in *Newbould* v. *Attorney-General.* (4) In *Salveson* v. *Administrator of Austrian Property* (5), where the validity of the marriage was in dispute, it was held that a decree of nullity of marriage, whatever might be the ground on which it was made, was a judgment determining status and was equivalent to a judgment in rem. Bateson J. in *Inverclyde* v. *Inverclyde* (6) followed dicta of Lord Haldane in *Salveson's* case. (7) The problem for decision in this case is a difficult one. There is no doubt that the authorities are conflicting. [They also referred to *G.* v. *M.* (8); *P.* v. *P.* (9) and *Turner* v. *Thompson.* (10)]

There is a specific statutory remedy enabling the taxing authority to recover money paid under a mistake. Sect. 125 of the Income Tax Act, 1918, empowers the Revenue Authorities to say that, owing to a mistake, the subject has been granted allowances to which he was not entitled. The additional assessments in this case are made under that section.

Raymond W. Needham K.C. and *Stephen R. Benson* for the respondent. The true view is that, wide as the terms of the decree of nullity are, there are certain things which no

(1) [1901] P. 20, 32.
(2) [1909] P. 20.
(3) [1931] P. 29.
(4) [1931] P. 75.
(5) [1927] A. C. 641.
(6) [1931] P. 29, 43.
(7) [1927] A. C. 641, 652.
(8) (1885) 10 App. Cas. 171.
(9) [1916] 2 I. R. 400.
(10) (1888) 13 P. D. 37.

decree can alter or remove. Until the date of the decree of nullity the respondent was liable for all the contractual obligations of the marriage. He was liable to support and, in fact, did support his wife. Facts which have existed and happened from the date of the marriage down to the date of the decree of nullity cannot be destroyed or reopened. The marriage contract was good in law and that contract continued until the decree of nullity was pronounced. Effect can only be given to the decree in the light of established facts. Things which have obviously happened cannot be destroyed by the decree. There is nothing in the Income Tax Act, 1918, which enables the Inland Revenue to destroy, under a decree, things which have already happened. It is important to bear in mind that income tax is an annual tax and the position of the taxpayer in any year of assessment must be ascertained on the facts then existing. If the respondent in this case had not made his income tax return for the year of assessment 1928–9, as a married man, he would have made a false return. It would have been incorrect for him to describe himself as an unmarried man. If either he or his wife had made an income tax return as an unmarried person, either would have been liable to penalties under the Income Tax Act, 1918, for making a wrong return. The Income Tax Act must be construed in relation to the plain facts of life as they exist in the year of assessment. The plain facts in this case were that the respondent and his wife had gone through a ceremony of marriage. In each of the relevant years of assessment they believed that they were married, and they were husband and wife until the decree of nullity was pronounced. The respondent had living with him the lady who was his wife until the decree was pronounced, and in that period he had been incurring the cost of her maintenance. For that reason he was, presumably, entitled to the increased allowance of 225*l.*, instead of the 135*l.* which was applicable to an unmarried man. There is nothing in the Income Tax Act, 1918, to justify an assessment to income tax being made in reference to facts which arise after the year of assessment.

[*Anderton & Halstead, Ld.* v. *Birrell* (1) was referred to.]

LAWRENCE J. In this case I find myself in agreement with the Commissioners.

The facts are that the taxpayer went through a form of marriage in the year 1921, and lived with the lady with whom he had gone through the form of marriage until 1933. During those years he claimed and was allowed the married man's allowance. In the year 1933 the respondent brought a suit for nullity of marriage on the ground of the incapacity of his wife. The decree nisi of nullity was pronounced on April 3, 1933, declaring the marriage null and void by reason of the incapacity of the respondent's wife. The decree nisi was made final on October 23, 1933. In those circumstances the Revenue Authorities have made additional assessments on the respondent on that portion of the allowance which was granted to him in each of the years 1928 to 1933 inclusive in excess of the personal allowance applicable to an unmarried man.

The question that I have to determine is whether those additional assessments were rightly made. That question really depends on the construction which is to be put on s. 18 of the Finance Act, 1920, which provides: "The claimant, if he proves that for the year of assessment he has his wife living with him, or that his wife is wholly maintained by him during the year of assessment, and that he is not entitled in computing the amount of his income for that year for the purposes of the Income Tax Acts to make any deduction in respect of the sums paid for the maintenance of his wife, shall be entitled to a deduction." The question of construction which arises on that section is whether the respondent did have his wife living with him, or whether his wife was wholly maintained by him during the years of assessment within the meaning of that section.

By s. 125 of the Income Tax Act, 1918: "If the surveyor discovers . . . . that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case " the surveyor may make or have made an additional assessment. It is under that section that these additional assessments have been made.

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(1) [1932] 1 K. B. 271.

The reason why the Revenue has taken this course in this case is because of the terms of the decree of nullity and what is said to be the effect of that decree in law. The decree, which is in the form which has been in use for very many years, and certainly for a very long time before the passing of the Matrimonial Causes Act, 1857, declares " the marriage in fact had and solemnized on the 22nd day of October 1921 . . . . to have been and to be absolutely null and void to all intents and purposes in the law whatsoever " and that the petitioner was and is " free from all bond of marriage with the said respondent." It is contended that by virtue of its terms rendering the marriage " null and void to all intents and purposes in the law whatsoever " the decree passed in 1933 made the respondent's de facto wife not his wife for the purposes of s. 18 of the Finance Act, 1920.

The terms of this usual form of decree were considered in the House of Lords in *Lewis* v. *Hayward* (1), and, as I have said, they have been in force for very many years.

A number of authorities have been cited to me by the Solicitor-General on behalf of the Crown, some of which are in favour of the view put forward on behalf of the Crown and others which are in favour of the view put forward on behalf of the taxpayer. I think the result of those authorities is that a marriage which is null on the ground of the incapacity of one of the spouses is voidable and not void; but when avoided, it is void ab initio, but not for all purposes. The question is whether there is sufficient recognition attached to the de facto marriage to justify the Court in adopting the interpretation of s. 18 of the Finance Act, 1920, that the " wife " there referred to includes a de facto wife whose marriage is otherwise regular and can only be declared null on the ground of incapacity due to impotence. It has been held that such a marriage will not be declared null except

(1) (1866) 35 L. J. (P.) 105.

1936

DODWORTH
v.
DALE.

Lawrence J.

at the instance of the injured party. That was decided in *Norton* v. *Seton.* (1) It has also been decided that such a marriage cannot be declared null and void after the death of the parties: see *A.* v. *B.* (2) and *Elliott and Sugden* v. *Gurr.* (3) It has also been held in other cases that time may be a bar to the granting of the decree and that the decree will not be granted if it is asked for on grounds that are not sincere.

The question of how far the marriage is to be regarded as a marriage has been alluded to on several occasions and on every occasion on which it has been alluded to the learned judges who dealt with the subject have indicated that transactions which have been concluded, things which have been done, during the period of the supposed marriage, cannot be undone or reopened after the marriage has been declared null and void.

The first of those cases is *Anstey and Others* v. *Manners* (4), which dealt with the liability of a husband for the debts of his wife after a sentence of divorce ab initio had been pronounced. Although in that case the suit which was brought by the person who had supplied the goods to the wife—some of them before the sentence and some of them after—was upheld, Park J. said this (4): " A sentence of divorce ab initio has been admitted to have been pronounced by the Ecclesiastical Court in June, 1811. From that time, therefore, Mr. Dalrymple ceased to be liable for debts contracted by the defendant." That implies in my view that Mr. Dalrymple was liable for the debts contracted by the defendant during the period of their union. The learned judge does not allude expressly to the fact that some of the goods had been supplied during the supposed marriage, but he goes on to say " If the wife becomes a single woman by operation of law, it is the same as if she had always remained single." I do not read that sentence as preventing the previous sentence from having its natural meaning.

I ought perhaps to have referred, before going to the decided cases, to Coke's Third Institutes, c. 27, p. 88 (1809 ed.), where he said with reference to the offence of polygamy: "Being married, etc.] This extendeth to a marriage de facto, or voydable by reason of a precontract, or of consanguinity, or of affinity, or the like: for it is a marriage in judgment of law until it be avoided, and therefore though neither marriage be de jure, yet they are within this statute."

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(1) 3 Phill. 147.

(2) (1868) L. R. 1 P. & M. 559.

(3) (1812) 2 Phill. 16.

(4) (1818) Gow 10, 11.

In *Dormer* v. *Ward* (1) there are some observations which I wish to read from the judgment of Vaughan Williams L.J.—a judgment which was concurred in by Lord Halsbury and A. L. Smith M.R. The application there was to the court under the Matrimonial Causes Act, 1859, s. 5, which is now reproduced in the Judicature Act of 1925, s. 192. The application there was to vary the terms of ante-nuptial and post-nuptial settlements in a case where there had been a decree of nullity on the ground of the impotence of the respondent. It was held "that, although the marriage had been declared void, and the covenant as to the payment of 200*l.* a year no longer took effect, the Court had jurisdiction under the Matrimonial Causes Act, 1859, on the application of the petitioner, to vary the settlement in respect of that settled property." Vaughan Williams L.J. said this (2): "Now, assuming that the Court has jurisdiction under s. 5 to make orders with reference to the application of the settled property, notwithstanding the fact that the parties to the avoided marriage have never had any child, it still remains to consider the question whether there is in this case any property settled as to which the Court can exercise its jurisdiction by making an order with reference to the application of it. Now, generally, no doubt, it is true that the section only gives power to make orders with reference to the application of property settled, and does not give the Court power to vary the settlement by treating as settled property which is not settled. But it is obvious that, inasmuch as the section applies to decrees of nullity of marriage, there must, if the section is to apply at all to nullity cases, be a power not only to make orders with reference to the

(1) [1901] P. 20.

(2) Ibid. 32.

application of property settled amongst the beneficiaries contemplated by the settlement, but also for application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words, the Court must read in the settlement child or children as meaning a child or children who are not issue of a marriage, and who are, therefore, illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage which has been avoided. The section says that the Court may inquire into the existence of settlements. Existence at what time? I think this means the existence of settlements at the time of pronouncing the decree: *Corrance* v. *Corrance*. (1) Now, I propose to read this settlement in the light of these conclusions. I find that at the time of the pronouncing of the decree a settlement existed between Mr. and Mrs. Ward. I do not find that the settlement continued in force after the decree. In my opinion this settlement did not do so. But I think that the Court has power to make orders with reference to the application of the property settled by the settlement in existence at the time of the decree, and I think that, on a motion for an order for the application of property settled, the Court, in the case of a decree of nullity, must, for the purpose of the order (if the section is to be applied to cases of nullity at all), read the settlement as if extended and varied so as to make the words 'parties whose marriage' connote parties whose marriage was no marriage, and, as must be necessary in a case where the decree of nullity was not based on impotency, 'children' and 'respective parents' connote illegitimate children and their unmarried father and mother. This is not merely to make an order for the application of 'property settled,' but to vary the settlement by making those beneficiaries under the settlement who, but for the order of the Court, would take no benefit under it. Unless one does this one makes the section a dead letter and of no effect in a nullity case." Then he reads a clause from the settlement and he says: "Now, in my judgment, the whole of this clause, and indeed the whole settlement, is according to its terms conditional upon a valid marriage taking place, and, although it is true that until the declaration of nullity this marriage was voidable only and not void, and that, therefore, that which has been done under the settlement cannot be undone, I yet think that this covenant in the settlement cannot be enforced after the decree of nullity without an order under s. 5, and I do not agree with the argument approved by Gorell Barnes J., that the covenant was either still in force or at an end, and that the petitioner must accept one of these alternatives, and, therefore, could only ask the Court to enforce a legal right which has nothing to do with an application under s. 5." So Vaughan Williams L.J. was there saying, with the concurrence of Lord Halsbury and A. L. Smith M.R., that that which has been done under a settlement during a de facto marriage of this sort cannot be undone.

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(1) (1868) L. R. 1 P. & M. 495.

The next case to which I wish to refer is the Irish case of *P.* v. *P.* (1) That was a case in which, in contemplation of a marriage, 475*l.* had been paid by the wife to the husband as her marriage portion, and it was agreed that 400*l.* of that sum should be applied in paying off a charge of that amount on the husband's lands. A marriage then took place, and shortly after the ceremony the husband paid off the charge of 400*l.* out of the 475*l.* There was subsequently a decree of nullity on the ground of the impotence of the husband. The suit was brought by the wife claiming to be repaid the sum of 475*l.* During the argument in the King's Bench Division an order was made giving the plaintiff leave to amend her writ by claiming a declaration " that the plaintiff is entitled to a charge on defendant's lands for 400*l.*" It was held by the Court of Appeal, affirming the decision of the King's Bench Division, " that the plaintiff was entitled, as upon a consideration that had failed, to be repaid by the defendant the sum of 400*l.*, and was entitled to stand in the place of the chargeant whose charge upon the defendant's lands had been paid off, and that the plaintiff had a good charge on the said lands

(1) [1916] 2 I. R. 400.

for this sum of 400*l.*" It was held by the King's Bench Division, and not disturbed by the Court of Appeal, "that as regarded the sum of 75*l.* paid to and expended by the defendant while the plaintiff lived with him as his wife, this was a concluded transaction which ought not to be disturbed." Madden J. said (1): "The marriage in the present case was not absolutely void, as in the case of a marriage void on the ground of consanguinity. When an essential condition of marriage is absent by reason of the incompetence of one of the parties, the person aggrieved may obtain a decree declaring the form of marriage which was entered into to be null and void. The plaintiff, if she had though fit, 'might,' in the words of Sir J. Hannen, 'have remained a wife enjoying all the advantages of a wife, save that of marital intercourse': *Turner* v. *Thompson.* (2) But the marriage being voidable at her option, the decree obtained by her is declaratory of the fact that no marriage ever took place. The decree in a case of nullity does not dissolve an existing marriage on the ground of facts which have come into existence after the contract was entered into, such as the adultery of the wife. Power to decree a divorce a vinculo on ground such as this was conferred on the English Matrimonial Court by the statute of 1857. The decree in the present case declares the form of marriage between the parties to be a nullity on the ground of facts existing when it was entered into, and a thing declared to be a nullity cannot constitute valuable consideration for a disposition of property; ex nihilo nihil fit. In support of the proposition that a voidable marriage followed by cohabitation can constitute a good consideration for an antenuptial disposition of property, Mr. Samuels relies on the cases of *Dunbar* v. *Dunbar* (3) and *Turner* v. *Thompson.* (2) The former of these cases, *Dunbar* v. *Dunbar* (3) is a case in which it was held that a completed and executed transaction effected while the parties live together is unaffected by a subsequent divorce. The husband purchased a house under circumstances which would raise a presumption that it was

(1) [1926] 2 I. R. 410.
(2) (1887) 13 P. D. 37.
(3) [1909] 2 Ch. 639.

intended as an advancement for his wife. The wife obtained a divorce in a suit of nullity of marriage. In a suit subsequently instituted by the wife, Warrington J. held that the doctrine of advancement applied. At the time of the purchase 'they were living together, and there was nothing whatever that I can see to lead the Court to suppose that the presumed intention in this case was different from the presumed intention in any other cases where a purchase is made in the name of the wife.'" Then he referred to *Turner* v. *Thompson*. (1) Then he goes on: "These cases are illustrations and applications of the settled principle that things executed and concluded while the parties live together have effect after divorce, and will not be disturbed. They do not assist the defendant's case further than as regards the sum of 75*l.*, expended while the parties were living together. They afford no defence as regards the charge of 400*l.*, by which the wife's money, paid to the defendant in anticipation of marriage, is now represented."

In the Court of Appeal Sir Ignatius O'Brien L.C. referring to the decree in use in the case of *A.* v. *A.* (2) said this (3): "It carefully describes it as a form of marriage. A form it was, and nothing but a form. As a marriage, from the moment the decree was pronounced it was void ab initio." Then he goes on to cite a passage from Lord Selborne's judgment in *G.* v. *M.* (4) in which he says: "I think I can perceive that the real basis of reasoning which underlies that phraseology is this,"—[that is the phraseology of sincerity]— . . . . "that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable and, I may say, of general jurisprudence."

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(1) 13 P. D. 37.
(2) (1887) 19 L. R. Ir. 403, 418.
(3) [1916] 2 I. R. 400, 423.
(4) 10 App. Cas. 171, 186.

Molony L.J. (1) refers to the particular part of Madden J.'s judgment dealing with the 75*l.* which had been paid and expended by the husband during the marriage, and he says: "He held that the latter was a concluded transaction by which both parties benefited, and ought not now to be disturbed, and I think that in this he was perfectly right."

Then there is the case of *In re Wombwell's Settlement* (2), which was a case of a settlement of 25,000*l.* It was held by Russell J., as he then was, that the settlement of that 25,000*l.* came to an end when the marriage was declared null and void and the settlor was absolutely entitled to the settled funds, under the express trust in his favour. But with reference to the interest on that money which had been expended during the course of the de facto marriage, no claim arose. In the argument it was put in this way (3): "It is submitted that from and after the decree of nullity the settlement is dead, and it may truly be said that the marriage, a valid and effectual marriage, has never been solemnized. In this case there was no marriage, but merely an irrebuttable presumption of marriage until the decree absolute was pronounced." Russell J. having had that argument before him and after referring to the judgment of Vaughan Williams L.J. in *Dormer* v. *Ward* (4) said this (5): "Those expressions show that, in the opinion of the judges of the Court of Appeal, a marriage which has been annulled on the ground of impotence was never a marriage at all, although, no doubt, it is recognised as valid until one of the parties to it takes proceedings to annul it." Later on, he says (6): "The decree of the Divorce Court establishes the fact that there never was a marriage and therefore the settlor is absolutely entitled to the funds comprised in the settlement under and by virtue of the express trust in his favour. It is quite true that no claim could be made by him for the return of the payments made by the trustees during the time when the validity of the marriage was not questioned, for, unless and until the wife intervened, all parties were bound to treat the marriage as valid and effectual."

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(1) [1916] 2 I. R. 442.
(2) [1922] 2 Ch. 298.
(3) Ibid. 301.
(4) [1901] P. 20, 32.
(5) [1922] 2 Ch. 306.
(6) Ibid. 308.

I do not think it necessary to refer to other authorities. There are, so far as I know, no authorities which doubt the proposition which is laid down in these authorities—namely, that what has been done during the continuance of the de facto marriage cannot be undone—cannot be overturned by the operation of law. I therefore consider myself bound by this considerable body of authority to adopt a similar view.

But the matter does not rest solely on the authority of these dicta. The matter has also been dealt with by the Matrimonial Causes Act, 1857, s. 32, which is reproduced in s. 190 of the Judicature Act, 1925: "The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life." Therefore, there the Legislature itself is speaking of the husband and wife as husband and wife in a case where there is ex hypothesi a decree of nullity of marriage. The same thing is true of s. 192 of the Judicature Act, 1925, which consolidates the Matrimonial Causes Act of 1859, s. 5, upon which the case of *Dormer* v. *Ward* (1) was decided. It there provides: "The Court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit." There again the Legislature is speaking of a marriage which has been declared null and void, describing it by the word "marriage." That fact is illustrated very clearly in the case of *Dormer* v. *Ward* (1), where Vaughan

(1) [1901] P. 20.

Williams L.J. refers to the implied changes which he found it necessary to make in the words of the settlement in order to accord with the provisions of that section.

In view of these authorities dealing with the effect which is to be given in law to a marriage which is declared null and void on the ground of impotency, and having regard to the expressions in the Matrimonial Causes Acts of 1857 and 1859, it appears to me that s. 18 of the Finance Act, 1920, ought to be read as applying to a wife who is de facto a wife living with her husband,—one whose marriage has not yet been avoided.

There is, however, another difficulty in the way of the Crown. In my opinion it is not lawful for an additional assessment or an original assessment to be made by reference to facts which arise after the year of assessment. In my view that is the reasoning of the decision of Rowlatt J. in *Anderton & Halstead, Ld.* v. *Birrell.* (1). I apprehend that there is no distinction in this matter between an original assessment and an additional assessment under s. 125. Taking s. 125 of the Income Tax Act, 1918, for the purposes of illustration, and because it was the section under which the additional assessments were made in this case, it seems to me that s. 18 of the Finance Act, 1920, and the Income Tax Act, 1918, relate to the facts as they exist at the time. The person chargeable was allowed a deduction, and he was rightly allowed a deduction at the time. He proved within the terms of s. 18 of the Act of 1920 that his wife was living with him, and he was rightly allowed a deduction at that time. In my view it is incompetent to the revenue authorities to make a fresh assessment on him by reason of a fact which is a real fact which arose after the year of assessment. The fact to which I refer is the fact that the husband in this case had determined to exercise his option, and had exercised his option to avoid the marriage. That was not a mere declaration of the law; it was a new fact which came into existence which might not have come into existence at all, but which did come into existence in the year 1932 or 1933.

(1) [1932] 1 K. B. 271.

In my judgment, the revenue authorities had no power to make an assessment upon the respondent in this case with reference to the years 1928 and following by reason of facts which came into existence after those years. On both of these grounds therefore, I am of opinion that this appeal must be dismissed. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant : *The Solicitor of Inland Revenue.*
Solicitors for the respondent : *Ralph Bond, Veitch & Bilney.*

T. W. M.

BERTRAM *v.* WIGHTMAN (INSPECTOR OF TAXES).

1936
May 15

Revenue—Income Tax—Assessments under Schs. A and B—Lands not in fact capable of beneficial occupation apart from house—Assessment on person entitled to occupation—Income Tax Act, 1918, *Sch. A, No. I., No. VII., rr.* 1, 2, 4 ; *Sch. B, r.* 4.

The appellant was assessed under Schs. A and B of the Income Tax Act, 1918, in respect of some 40 acres of land, consisting of lawns, gardens, drives, pathways, woods and shrubberies surrounding a house of which he was the owner. The property was vacated by the appellant on December 2, 1933, and since that date had been unoccupied. The proportion of tax charged in respect of the house and buildings had been discharged under r. 4 of No. VII. of Sch. A.

The Commissioners held that the appellant was properly chargeable as being the person who was the occupier of the property within the meaning of the Income Tax Acts, and that the property was assessable to income tax whether or not the occupier chose to exercise his rights of occupation :—

Held, by Lawrence J., that the Commissioners were right. To hold, as the appellant contended, that the words " having the use of any lands or tenements " in r. 2 of No. VII. of Sch. A meant " actually using the lands " resulted in an apparent conflict between r. 4 and rr. 1 and 2. That conflict could not have been intended and could be disposed of by giving to the words in r. 2 the meaning " entitled to the beneficial use of any lands or tenements." The contention that " occupation " had the same meaning in the Income Tax Acts as in the law of rating was not supported by the dictum of Scrutton L.J. in *Back* v. *Daniels* [1925] 1 K. B. 526 relied on by the appellant. The difference between the law of rating and the income tax law

1936

BERTRAM
v.
WIGHTMAN.

was that the Statute of Elizabeth contained no definition of "occupier," and therefore occupation had to be treated as a question of fact, whereas in the Income Tax Act r. 2 provided that a certain person should be deemed to be the occupier although he did not occupy the lands in fact.

Hill v. *Gregory* [1912] 2 K. B. 61 distinguished.

But since the assessment on the lands was in the same amount as when they were occupied with the house, the case must be remitted to the Commissioners for them to ascertain the annual value of the lands apart from the house.

APPEAL by case stated from a decision of the Commissioners for the General Purposes of the Income Tax for the division of Linton, Cambridgeshire, dismissing an appeal by the present appellant, J. Bertram, against assessments to income tax under Schs. A and B of the Income Tax Act, 1918 (1), in

(1) The Income Tax Act, 1918, Sch. A: "Tax under Schedule A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof."

No. I.: "In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value . . . . the annual value shall be understood to be . . . . (2.) if they are not let at a rackrent . . . ., then the rackrent at which they are worth to be let by the year."

No. VII., r. 1: "Save as in this Act provided in any particular case, tax under this Schedule shall be charged on and paid by the occupier for the time being."

Rule 2: "Every person having the use of any lands or tenements shall be deemed to be the occupier thereof."

Rule 4: "Tax under this Schedule shall be charged on all lands, tenements and hereditaments, whether occupied at the time of assessment or not, but if any house is or becomes unoccupied for the year or for part of the year of assessment, the tax shall not be levied thereon during the period while it is so unoccupied, and the general commissioners, on proof of the period during which the house was unoccupied, shall upon appeal discharge the tax in respect of that period."

Sch. B: "Tax under Schedule B shall be charged in respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom for every twenty shillings of the assessable value thereof estimated in accordance with the rules of this Schedule."

Rule 1: "Tax under this Schedule shall be charged in addition to the tax to be charged under Schedule A on all the properties in this Act directed to be charged to the said tax according to the general rule of No. I. of Schedule A. . . . ."

Rule 4: "Rules 1, 2, 3, 4, and 5 of No. VII. of Schedule A, relating to the person chargeable, shall apply in the case of this Schedule as they apply in the case of Schedule A."

respect of lands owned by him and known as "Abington Hall," for the years 1933–34 and 1934–35.

The following facts were proved or admitted: The property was vacated by the appellant on December 2, 1933, and continued to remain unoccupied after that date. Relief under Sch. A, No. VII., r. 4, had been granted by discharging the proportion of tax charged under Sch. A in respect of the house and buildings. The tax in dispute and remaining in charge under Schs. A and B was in respect of the assessments relating to the lands only.

After December 2, 1933, the appellant attempted to sell the property through agents. He caused a certain amount of weeding to be carried out in the kitchen-garden, and a small quantity of asparagus was cut and sent to his son.

It was stated during the hearing to be the practice of the Revenue Authorities in assessing houses to tax to include with each an area of one acre only for assessment purposes. The lands which, according to the appellant, it was being sought to charge with income tax were lands consisting (inter alia) of kitchen-garden, lawns and gardens, drives and pathways, woods and shrubberies near the Hall, other woodlands and shrubberies and the river, amounting in all to some 40 acres.

It was contended for the appellant that, as he had vacated the Hall and as he no longer had any residence in or near Cambridgeshire, the lands surrounding the Hall were incapable of occupation apart from the Hall itself. (2.) That the occupier within the meaning of r. 2 of No. VII. of Sch. A was the person having the use of the land, and that the appellant could not be considered to be the occupier as he had purposely refrained from exercising his rights of user of the land, with the exception of the weeding carried out in order to avoid depreciation, and the small quantity of asparagus which had been cut. [The appeal was withdrawn as to the kitchen-garden.] (3.) That the lawns, gardens, drives and groves could not be let without the house, even for grazing, and that there could consequently not be, and in fact were not, any profits or gains chargeable to tax or otherwise.

Reference was made on the appellant's behalf to *London*

County Council v. *Attorney-General* (1); *Back* v. *Daniels* (2); *Commissioners of Inland Revenue* v. *Miller* (3); *Fry* v. *Salisbury House Estate, Ld.* (4).

It was contended for the respondent: (1.) That the income tax in dispute had been charged and assessed in accordance with the provisions and rules of the Income Tax Acts which were relevant—namely, Sch. A, Charging section; Sch. B, Charging section and No. 1 General Rule; Sch. B, r. 4; Sch. A, No. VII., rr. 1, 2, 3, 4 and 5. (2.) That the property was assessable under Sch. A as it was capable of actual occupation, and that the appellant, being the person who had the right to use the lands, was in fact the occupier. (3.) That the property was assessable to tax under Schs. A and B whether occupied or not.

The Commissioners were of opinion that the appellant was properly assessed under Schs. A and B as being the occupier of the property within the meaning of the Income Tax Acts, and that the property was assessable to income tax whether or not the occupier chose to exercise his rights of occupation.

Oliver Bertram and *Joseph Vaughan* for the appellant. The words in r. 2 of No. VII. of Sch. A "having the use" are to be interpreted as "actually using," not as "having the beneficial use of." (See Konstam on Income Tax, 6th ed., p. 51, and *Hill* v. *Gregory*. (5)) This view is supported by the fact that the law of rating is applicable to the law of income tax (*Back* v. *Daniels* (6); Konstam, p. 49). In the law of rating it is well established that land may be unoccupied by any one, and thus cease to be rateable (*Reg.* v. *St. Pancras Assessment Committee* (7); *Smith* v. *New Forest Union* (8); *Holywell Union* v. *Halkyn Drainage Co.* (9); *Winstanley* v. *North Manchester Overseers* (10); *Liverpool Corporation* v.

(1) [1901] A. C. 26.
(2) [1925] 1 K. B. 526.
(3) [1930] A. C. 222.
(4) [1930] A. C. 432.
(5) [1912] 2 K. B. 61.
(6) [1925] 1 K. B. 526, 541–3.
(7) (1877) 2 Q. B. D. 581, 588.
(8) (1889) 54 J. P. 324.
(9) [1895] A. C. 117, 120, 121, 125, 127.
(10) [1910] A. C. 7, 14, 15.

Chorley Union Assessment Committee. (1)) The intention of the alleged occupier and the surrounding facts are to be looked at to establish whether or not there is rateable occupancy. (*Overseers of Bootle* v. *Liverpool Warehousing Co.* (2) ; *Smith* v. *New Forest Union.* (3)) Further, income tax is a tax on some benefit actually received, not on some benefit which might be enjoyed. (*Commissioners of Inland Revenue* v. *Wemyss* (4) ; *Shanks* v. *Commissioners of Inland Revenue* (5) ; *Commissioners of Inland Revenue* v. *Miller* (6) ; *Fry* v. *Salisbury House Estate, Ld.* (7)) A person is not compelled to enjoy a potential benefit, but may waive his rights. (*Dewar* v. *Commissioners of Inland Revenue.* (8))

Sir Terence O'Connor S.-G. and *R. P. Hills* for the Crown. There was evidence on which the General Commissioners could find that the appellant was the occupier of the property. The examination of previous authority, and in particular the rating cases may be useful up to a point, but the words of the statute are the primary guide and the appellant clearly fell within the statutory definition as a person "having the use" of the lands within r. 2 of No. VII. of Sch. A. The case was not one of lands left derelict by the owner. It is necessary in considering the rating cases to remember that the statute 43 Eliz., c. 2, contains no such definition, and that the Courts have been free in those cases to deal with occupancy as a question of fact.

Bertram in reply. If the same rules apply as in the law of rating, the appellant clearly was not chargeable in view of *Smith* v. *New Forest Union.* (3) But if the statement in Konstam on Income Tax is wrong, one must read two rules of No. VII. of Sch. A together to make them consistent with each other.

LAWRENCE J. The appeal is from the Commissioners, who have decided that the assessment that was made upon the appellant should stand under Sch. A and Sch. B in respect of certain lands, gardens, woods and plantations which surround the appellant's house "Abington Hall," which he vacated on December 2, 1933, and has not since made use of. He has made this slight use of the kitchen-garden adjoining "Abington Hall," that a certain amount of weeding was done there, and a small quantity of asparagus which, as I gather, continued to grow though it was not cultivated since December 2, 1933, was cut and sent to his son; but as to this the appellant's appeal with reference to the kitchen-garden was withdrawn, and as to the rest of the grounds, woods and plantations there has been, as I understand the case, no user at all. In those circumstances the question is whether the appellant is taxable under Sch. A and Sch. B as being the occupier of these grounds and woods.

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(1) [1911] 1 K. B. 1057, 1072 ; [1912] 1 K. B. 270, 286–288, 290 ; [1913] A. C. 197.

(2) (1901) 85 L. T. 45, 48.

(3) (1889) 54 J. P. 324.

(4) 1924 S. C. 284 ; 61 S. L. R. 262 ; 8 Tax Cas. 551.

(5) [1929] 1 K. B. 342, 358.

(6) [1930] A. C. 222, 230, 241.

(7) [1930] A. C. 432.

(8) [1935] 2 K. B. 351, 366, 370.

The question turns upon the meaning of rr. 1, 2 and 4 of No. VII. [He read the Rules.] What is the meaning of the words "having the use of any lands or tenements" within the meaning of r. 2? Do those words mean "entitled to the beneficial use of the lands," or do they mean "actually using the lands"? The appellant contends that they mean the latter, "actually using," and that if the owner of lands does not make any use of them at all he is not a person having the use within the meaning of r. 2; that therefore he is not the occupier, and that therefore no tax can be imposed under Sch. A or under Sch. B, because there is no occupier to be charged; that is to say, of course, on the assumption that there is nobody else but the owner who has the use in that sense of the lands in question. The appellant admits that if that is the meaning of r. 2 there is an apparent conflict between r. 4 and rr. 1 and 2, because by the terms of r. 4 the tax is to be charged on all lands, tenements and hereditaments whether occupied at the time of the assessment or not. In my judgment that is a conflict between the two Rules which cannot have been intended, and therefore if it is possible to give a fair interpretation to the words in r. 2 of No. VII. which disposes of this conflict, that interpretation ought to be given. It seems to me that the words "having the use of" may fairly be given the interpretation of "entitled to the beneficial use of any lands or tenements," and I think that view is supported by the fact that that Rule is a definition of the word "occupier" which contemplates, by the use of the words "shall be deemed to be," the fact that the person so defined is not the occupier in fact but is only deemed to be the occupier. If the lands are not occupied in fact, the person who has the right to use them, or who has the use of them, may still be deemed to be the occupier although he is not in fact in occupation. That seems to me to be the fair interpretation of the words "having the use of any lands or tenements" within the meaning of r. 2 having regard to the provisions of r. 4.

The view put forward by the appellant is supported by a passage in the well known book on income tax written by Judge Konstam at p. 51 of the 6th ed., but for the reasons I have given I am unable to agree with the view of the learned author.

A further difficulty was raised by the appellant because he said that it has been laid down that the law of rating as to what is occupation is applicable to income tax, and a passage in the judgment of Scrutton L.J. in *Back* v. *Daniels* (1) was referred to for the purpose of supporting that view. It is true that Scrutton L.J. said this: "Schedule B is levied on occupiers, and 'occupiers,' who are charged with the tax under Schedule A with a power of deduction from the rent due to the owner, are defined in No. VII., r. 2, as persons having the use of the land. The term is probably used in the same sense as in the law of rating. That sense may be collected from the judgments of Lush J. in *Reg.* v. *St. Pancras Assessment Committee* (2) and of Buckley L.J. in *Liverpool Corporation* v. *Chorley Assessment Committee* (3), and appears to involve possession of a permanent character such that trespass could be brought by the occupier with the enjoyment of a benefit from the land." It is said, therefore, that the Lord Justice laid down for all purposes that the law of rating as to occupation is applicable to the Income Tax Acts, but in my opinion the

(1) [1925] 1 K. B. 526, 541.
(2) (1877) 2 Q. B. D. 581, 588.
(3) [1912] 1 K. B. 270, 287.

observation cannot be pressed to that extent. Scrutton L.J. was not considering the case with which I have to deal here. He was dealing with a case in which the question was whether a wholesale firm of potato merchants who were using land for the purpose of growing potatoes, land which belonged to a farmer, and which was partly farmed by the farmer, had the use of the land so as to be occupiers within the meaning of r. 2 of No. VII., and all that the Court did was to hold that the respondents in those circumstances had the use of the lands in the full sense; that is to say, they had the beneficial use, and it was only for that purpose that Scrutton L.J. was referring to the rating cases.

The only other authority to which my attention has been drawn for the purpose of showing that the rating cases are directly applicable to income tax for the purpose of occupation was the case of *Commissioners of Inland Revenue* v. *Wemyss*. (1) But there again the Lords of Session, and the Lord President in particular, were not dealing with a case where there was no occupier, as is suggested to be the position in the present case. The Lord President was saying in that case that the true occupiers of Wemyss Castle were the trustees. It is true that it has been held in rating cases, or at any rate the view has been indicated in connection with rating cases, that if land is derelict, is left by its owners, and is not occupied by any one else, it becomes not rateable. That view is indicated by Hamilton J., as he then was, in *Liverpool Corporation* v. *Chorley Assessment Committee* (2), in which the Liverpool Corporation were rated in respect of the gathering ground for their waterworks, a gathering ground from which they had excluded all members of the public, so that the water which was there gathered by nature should not be either used or contaminated, and which they also used for the purposes of sport. In my judgment, the difference between the law of rating and the income tax law is that in the Statute of Elizabeth there is no definition of "occupier," and therefore occupation has to be treated as a question of fact, whereas in the Rules to which I have alluded in the Income Tax Act of 1918 there is the definition in r. 2, which provides that a certain person shall be deemed to be the occupier, and r. 4, which provides that the tax shall be charged on all lands whether occupied at the time of assessment or not, from which it appears to me that although a person is not an occupier in fact, he may be deemed to be the occupier if he has the use of the lands, and therefore that he may have the use of the lands although he does not occupy them in fact.

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(1) 1924 S. C. 284; 61 S. L. R. 262; 8 Tax Cas. 551, 575, 576.

(2) [1911] 1 K. B. 1057, 1072.

The only other case which it is necessary for me to refer to is the case of *Hill* v. *Gregory* (1), which was also decided by Hamilton J., as he then was. It was a case in which a landlord had let the surface of his land to a farmer, and also leased the minerals subjacent to a company for the purpose of being worked as a mine, and the lease provided that certain minimum payments should be made in the first four years of the lease provided the working did not produce profits larger than those minimum sums. The company, the lessee, made no entry under the lease, but when they paid the minimum rents during the first four years to the landlord they deducted income tax, but did not pay it over to the Revenue Authorities. An assessment was then made upon the landlord in respect of the sums which were paid to him, and he contended that he was not liable because he was not the occupier of the minerals, but that the mining company was the occupier of the minerals. Hamilton J. said this: " The appellant says on the contrary that he is not in possession at all "—the landlord was the appellant—" and that possession, at least constructive possession, of the minerals is in the company; therefore, the appellant cannot be brought within r. 6 of Case No. II. whatever might be the case with regard to the company." The Rules were in substantially the same form as they are now since 1918. " Further, it is said if the Case be placed under the first general rule in Case No. I. which is to be ' construed to extend to all lands, tenements, and hereditaments, or heritages capable of actual occupation, of whatever nature, and for whatever

(1) [1912] 2 K. B. 61.

purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this Schedule,' then again, because the company is in possession, it and not the appellant should have been charged, under s. 63, Case IX., rr. 2 and 3. In my opinion the facts as found by the Commissioners prevent me from saying that, in the ordinary sense of the word, the company is the occupier of these minerals at all. There is not only no finding that it has ever entered upon the subject-matter of this demise, but I can only read the finding as negativing that view.

Then it is said, that though the company has never entered, it may be within the definition of occupier for the purposes of this Act, for, although it has never entered upon the minerals demised by the appellant, it has in contemplation of law entered upon them by entering on mineral subjacent under other land which it owns. Rule 2 of Case IX. of s. 63 of the Act of 1842 is: 'Every person having the use of any lands or tenements shall be taken and considered, for the purposes of this Act, as the occupier of such lands or tenements.'" That is the corresponding Rule to r. 2 of No. VII. "I do not think" Hamilton J. continued "those words mean that every person who is entitled by a demise to have the use when he chooses to enter and take that use, is to be deemed to be the occupier. The authority to which Mr. Danckwerts referred, the *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* (1) rather negatives than supports that argument, and I think that the person in whom these minerals were vested and who up to the time in question has continued to have them vested in him, was the occupier in contemplation even of that decision. . . . . It seems to me sufficient to say that the company is not, in my view, brought within r. 2 of Case IX. of s. 63, and is not, in fact, as found by the case, brought within r. 1 of that Case, and accordingly, as the argument against the case falling within Sch. A fails, I think that it really falls within r. 6

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(1) [1907] A. C. 264.

of Case II. of s. 60, and that the appellant was chargeable under that Rule."

I have had some doubt as to whether I ought to consider myself bound by that decision to hold, contrary to my own opinion, that the construction contended for by the appellant ought to be given to r. 2 of No. VII., but I have come to the conclusion that the case of *Hill* v. *Gregory* (1) is properly distinguishable from the present case on the grounds that Hamilton J. was there basing his decision on this part of the case upon the fact that the minerals in question were still vested in the appellant, the landlord, and that there having been no entry on the part of the lessees under the mineral lease, the lessees did not fall within the terms of r. 2, and, secondly, the consideration which is not expressly referred to by Hamilton J., but which I think is material, that in the circumstances where a lease had been granted but no entry taken place, it was reasonable to consider, and was right to consider, that the hereditament which would be created by the lease had not then been created, and that the minerals therefore remained as part of the land, and that any profits which the owner of the land derived from them arose from the land within the meaning of the appropriate Rules of the Income Tax Acts. I, therefore, am of the opinion that it would not be right for me to adopt in the present case the construction of rr. 2 and 4, which seems to me to be in conflict with the true interpretation of the Act, on account of this case of *Hill* v. *Gregory*. (1) My judgment, therefore, is that the appellant was the occupier of the lands and woods surrounding "Abington Hall" although in fact neither he nor any one else made any use of them during the years in question.

There is a subsidiary point on which I think the case ought to be remitted to the Commissioners, and it is as to the amount of the assessment which ought to be made upon these lands. The assessment which was made was, as I understand it, the same assessment that had been made before December 2, 1933, when the appellant vacated the mansion. It was

(1) [1912] 2 K. B. 61.

divided into two parts, one part dealing with the house and buildings, which were assessed at 185*l.*, and the other, the lands, woods and plantations, which were assessed at 63*l.* As I say, I understand it was the same assessment as had been put upon the lands and woods whilst the appellant was living at the mansion-house. It appears to me that though the appellant may remain the occupier for the purposes of income tax in the circumstances which have taken place, yet, where he has taken his furniture out of his house, has left the house, and has left the grounds, that the annual value of those grounds and plantations may be something very different from what it was to a person who used the house and the grounds in conjunction, and it appears to me that this point was raised before the Commissioners by para. 3 (*c*) of the contentions in the words: "That the lawns, gardens, drives and groves could not be let without the house, not even for grazing, and consequently, there could be no profits or gains chargeable to income tax, and that in fact there were not, and could not be, any profits or gains." That question having been raised in that form the Commissioners, who had before them this difficult and important question of law as to whether the appellant was the occupier in the circumstances, framed their decision in these words: "We held that the appellant was properly chargeable to income tax under Schs. A and B as being the person who was the occupier of the property within the meaning of the Income Tax Acts, and that the property was assessable to income tax whether or not the occupier chose to exercise his right of occupation." That was all the Commissioners said, and I think it would be fair and proper that the case should be remitted to them for the purpose of their considering whether there should not be any variation in the assessment of the lands and woods having regard to the fact that they are occupied without the house or that the appellant is to be deemed the occupier although he is in fact making no use of the lands and woods. It seems to me prima facie the assessment would be something different from what it was before, and it ought to be considered by the Commissioners.

The matter will, therefore, go back to the Commissioners upon that basis.

Appeal dismissed.

Solicitors for appellant : *Julius Bertram.*
Solicitor for the Crown : *Solicitor of Inland Revenue.*

J. W. H.

COMMISSIONERS OF INLAND REVENUE *v.* PEARSON. SAME *v.* PRATT.

1936
April 27, 28 ;
May 28.

Revenue—Income tax—Sur-tax—Company—Dividend—Deduction of tax—Shareholder's liability—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 39, *sub-s.* 2—*Finance Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 28), *s.* 7.

In paying a dividend to a shareholder the company stated that it had not exercised its right to deduct income tax and that the dividend was paid in full. The dividend was paid out of accumulated profits and income tax had been paid on profits for the year in the hands of the company :—

Held, that the dividend so paid was the net and not the gross income, and that in making his return for sur-tax the shareholder must add to it the amount of income tax thereon at the standard rate for the year.

Ashton Gas Company v. *Attorney-General* [1906] A. C. 10 followed.

Neumann v. *Inland Revenue Commissioners* [1934] A. C. 215 discussed and distinguished.

TWO CASES stated by the Special Commissioners for Income Tax under the Income Tax Act, 1918, s. 149, and the Finance Act, 1927, s. 42, sub-s. 7.

The following is a summary of the facts stated in the special case relating to the respondent William E. Pearson. The respondent was the beneficial owner of 5000 deferred ordinary shares in W. Pearson, Ld. On March 29, 1934, a dividend of 130 per cent. on those shares was declared and on the same date the respondent received a cheque for 6500*l.*

in payment thereof. Accompanying the cheque was a letter stating that it had been decided that the company should not exercise its statutory, but optional, right to deduct income tax when paying the dividend and that therefore the dividend was being paid in full. The letter went on to state the amount of tax which might have been deducted—namely, 1625*l.* In his return of total income for sur-tax for 1933–34 the respondent returned 6500*l.* in respect of the above dividend. The Crown claimed that the amount which ought to have been returned was 8666*l.* 13*s.* 4*d.*, being 6500*l.*, plus 2166*l.* 13*s.* 4*d.* in respect of income tax at the standard rate of 5*s.* in the pound. The profits of the company for the year were duly charged to income tax in the hands of the company.

The dividend in question was paid out of accumulated profits, and the respondent's right to it depended on the terms of the resolution declaring it.

The Special Commissioners were of opinion that the respondent was entitled to 6500*l.*, which he had received. If the company had exercised their right to deduct tax he would have received 6500*l.* less 1625*l.*—namely, 4875*l.* They did not consider that the dividend resolution of March 29, 1934, could be read as equivalent to the declaration of a dividend free of income tax. They therefore held that the 6500*l.* was not a net amount, but was the actual sum paid and assessable, and they accordingly allowed the appeal.

In the respondent Pratt's case the facts stated in the special case were as follows: Henry Pratt held 40,000 ordinary shares in a company called Compo, Ld. On January 24, 1934, a resolution was passed by that company that a dividend of 7⅞ per cent. be approved and paid or passed to the credit of shareholders' accounts. On the same day the company sent to the respondent a voucher in these terms: "Gross dividend of 7⅞ per cent. on 40,000 shares in the above company for the year ended December 31, 1933, 3150*l.* Amount actually paid, 3150*l.*" In his return of total income for surtax for the year ended April, 1934, the respondent included the sum of 3150*l.*, being the actual amount received by him, and he contended that the dividend was a "gross sum" and that the fact that the company had not exercised its right to deduct income tax did not make it a "net" sum.

The Crown contended that in estimating the total income the correct amount to be included in respect of the dividend was 4200*l.*—namely, 3150*l.*, with the addition of tax at the standard rate for the year—namely, 5*s.* in the £.

The Special Commissioners were of opinion that the 3150*l.* was a gross amount and was the proper amount assessable to sur-tax in respect of the dividend, and they accordingly allowed the appeal.

In both cases application was made to the Commissioners to state a case on the ground that the decision was wrong in law.

Sir Donald Somervell A.-G. and *R. P. Hills* for the appellants. The proper amount of dividend to be returned is 8666*l.* 13*s.* 4*d.* in Pearson's case and 4200*l.* in Pratt's case. By the Finance Act, 1931, s. 7, sub-s. 2, the dividend paid by a company shall, to the extent to which it is paid out of profits and gains of the company which have been charged to tax be deemed to represent income of such an amount as would, after the deduction of tax authorized by r. 20 be equal to the net amount received. (1)

The decision in *Ashton Gas Co.* v. *Attorney-General* (2) governs the present case, and that authority was followed in

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(1) The Finance Act, 1931, s. 7, provides :—

"(1.) The provisions of rule 20 of the General Rules which authorize the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorizing the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax . . . ."

"(2.) Subject as hereinafter provided, a dividend paid by a body of persons whether before or after the commencement of this Act shall, to the extent to which it is paid out of such profits and gains as are mentioned in sub-section 1 of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorized by the provisions of the said rule 20, be equal to the net amount received."

(2) [1906] A. C. 10.

Samuel v. *Inland Revenue Commissioners* (1) and *Michelham* v. *Inland Revenue Commissioners.* (2) It was also approved in *North British Ry. Co.* v. *Scott* (3) and *Hartland* v. *Diggines.* (4) In *Gimson* v. *Inland Revenue Commissioners* (5) the income out of which the dividend was paid was not subject to income tax and that case does not apply here. The main case relied on by the respondents is *Neumann* v. *Inland Revenue Commissioners* (6), but that is also distinguishable. There profits were taxed under Sch. A. No doubt the House of Lords in that case was at pains to repudiate the extreme doctrine laid down by the Court of Appeal, which was that, where tax could not be deducted, the shareholder had not paid tax through the company and was therefore assessable. In *Neumann's* case (6) income tax was deducted from dividends on the basis of the annual value of the lands from which the income arose. The remainder was placed to a reserve fund and was afterwards distributed in full. Hence the dividends could not be described as " tax free." Where the company's profits have been taxed, as here, and the company has power to deduct tax from the shareholders' dividends, the sum paid is a net sum to which must be added for purposes of sur-tax the amount of tax appropriate to the profits distributed in dividend.

They referred also to *In re Sharp.* (7)

R. E. Borneman for the respondents. Where the company makes no deduction for tax on payment of dividend, the Finance Act, 1931, s. 7, sub-s. 2, has no application. The dividend fund so created cannot be exceeded. That is in accordance with the decision in *Neumann's* case. (6) *Ashton Gas Co.* v. *Attorney-General* (8) does not apply, inasmuch as it was decided under the Income Tax Act, 1842, s. 54, and not upon r. 20 of the General Rules. In *Neumann's* case (6) Lord Tomlin said: " If a deduction from the gross sum was authorised but was not in fact made, as was the case here, there is in my opinion nothing in the language of the

(1) [1918] 2 K. B. 553.
(2) (1931) 15 Tax Cas. 737.
(3) [1923] A. C. 37.
(4) [1926] A. C. 289.
(5) [1930] 2 K. B. 246.
(6) [1934] A. C. 215.
(7) [1906] 1 Ch. 793.
(8) [1906] A. C. 10.

section which entitles the Inland Revenue to treat the gross sum as being greater than in fact it was. From the income tax point of view it makes no difference to the revenue whether the deduction is made or not, because the company does not have to account for what it deducts." Dividends as such are not chargeable to tax. *In re Sharpe* (1) only decided that trustees must not give too large a benefit to one beneficiary at the expense of the others, and is no authority from the point of view of revenue.

The shareholder is not in the position of a partner, and has no right to the dividend until it is declared. The tax on profits is paid by the company without regard to the shareholders, and, as the directors here exercised their option not to deduct, the amount of dividend paid remained a gross and not a net sum.

Sir Donald Somervell A.-G. in reply.

Cur. adv. vult.

May 28. LAWRENCE J. read the following judgment: In these cases, which were heard together, the question is whether the respondents are bound to bring in for sur-tax dividends which were declared by certain companies in which the respondents were shareholders without stating that the dividends were free of income tax, or less tax, at the declared amounts of the dividends, or at those amounts plus income tax. In Pearson's case the facts were that: "At a meeting of the directors of the company held on March 29, 1934, a resolution was passed whereby it was resolved that 'a dividend of 10 per cent. on the preferred ordinary share capital of the company and also a dividend of 130 per cent. on the deferred ordinary share capital of the company be and are hereby declared and shall be paid forthwith.' On the same date—namely, March 29, 1934—a cheque for 7489*l.* 16*s.* was sent to the respondent. Accompanying the said cheque was a letter addressed to the respondent from the company in the following terms: 'Dear Sir, I have pleasure in enclosing herewith a cheque for 7489*l.* 16*s.* representing

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(1) [1906] A. C. 10.

1936

INLAND REVENUE COMMISSIONERS v. PEARSON. SAME v. PRATT.

Lawrence J.

the amount due to you in respect of dividends declared on the 29th March, 1934. This cheque is made up as follows: dividend of 10 per cent. on 9898 preferred ordinary shares of 1*l.* each, 989*l.* 16*s.* Dividend of 130 per cent. on 5000 deferred ordinary shares of 1*l.* each, 6500*l.*' "—which added up make 7489*l.* 16*s.*—" 'Will you kindly observe that it has been decided that the company shall not exercise its statutory but optional right to deduct income tax when paying these dividends and that therefore the dividends are being paid to you in full. In order, however, to conform with section 33 of the Finance Act, 1924, I am to inform you that if the company had exercised its right to deduct income tax the appropriate rate would have been 5*s.* in the £ and the amount deducted would have been 1872*l.* 9*s.* Yours faithfully, William Pearson, Limited.' "

In Pratt's case the facts were that on January 24, 1934, the company declared a dividend in the following terms: "Resolved that a dividend of 7⅞ths per cent. be approved and paid or passed to the credit of shareholders' accounts." On the same day the company sent to the respondent a voucher in the following form: "January 24, 1934. Gross dividend of 7⅞ths per cent. on 40,000 shares in the above company for the year ending December 31, 1933, 3150*l.* Amount actually paid, 3150*l.* I hereby certify that income tax on the profits of the company, of which profits this dividend forms a portion, has been or will be, duly paid to the proper officer for the receipt of taxes."

The cases appear to me to be of some importance, as, if the decision of the Commissioners is correct, any company can ensure that its shareholders shall only be taxable to sur-tax on the actual amount they receive in cash by declaring dividends without qualification. The Commissioners have considered that the cases are governed by *Neumann* v. *Commissioners of Inland Revenue* (1), and the question depends upon whether that case, or *Ashton Gas Co.* v. *Attorney-General* (2) is applicable. It is argued for the Crown that the case is governed by the *Ashton Gas Company's* case, which has been followed and approved in *Samuel* v. *Commissioners of Inland Revenue* (1) and in *Michelham* v. *Commissioners of Inland Revenue* (2); that *North British Ry. Co.* v. *Scott* (3) and *Hartland* v. *Diggines* (4) support the same view; that the decision in the *Ashton Gas Company's* case was that a dividend not declared as free of tax was, in fact, a dividend of its stated amount plus the amount of income tax thereon; that *Neumann's* case (5) was decided upon peculiar facts, and is therefore inapplicable; that the actual amount of dividend which a shareholder receives out of profits and gains which have borne tax under Sch. D must always be received after deduction of tax since dividends are not assessable in the hands of the shareholder; that therefore it makes no difference whether a dividend is declared as X pounds without qualification or as X pounds free of tax, and that the distinction between these present cases and *Neumann's* case (5) is that here the company's profits were taxed under Sch. D, pound for pound, and the dividends in question did not exceed the residue of the profits after payment of tax, whereas in *Neumann's* case (5) the profits of the company had been taxed under Sch. A, and tax had been deducted from dividends paid thereout on the basis of the annual value of the lands from which the income arose, leaving a sum which was placed to reserve in a specially segregated fund, and afterwards distributed in toto, so that the dividends therefrom were not in fact, nor could they be, described as tax free.

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(1) [1934] A. C. 215.

(2) [1906] A. C. 10.

It was contended, on the other hand, by Mr. Borneman for the respondents, with much ability, that the case is governed by *Neumann's* case (5); that the *Ashton Gas Company's* case (6) was before the House of Lords in that case; that the *Ashton Gas Company's* case was distinguishable because it was decided upon s. 54 of the Act of 1842, and not upon r. 20 of the General Rules; that it was only an authority as to what are profits; that the decision of *Neumann's* case (5) was that where no deduction for tax is

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(1) [1918] 2 K. B. 553.
(2) (1931) 15 Tax Cas. 737.
(3) [1923] A. C. 37.
(4) [1926] A. C. 289.
(5) [1934] A. C. 215.
(6) [1906] A. C. 10.

1936

INLAND REVENUE COMMISSIONERS *v.* PEARSON.

SAME *v.* PRATT.

Lawrence J.

made by a company, the Finance Act, 1931, s. 7, sub-s. 2, has no application; that a company when it declares a dividend creates a dividend fund which cannot be exceeded any more than could the specially segregated fund dealt with in *Neumann's* case (1); that the Crown's contention would involve that this fund should be exceeded and that cases such as *North British Ry. Co.* v. *Scott* (2) and *Hartland* v. *Diggines* (3) have no bearing, being decided on Sch. E.

I am of opinion that the contention of the Crown is correct. The reasoning of the *Ashton Gas Company's* case (4) appears to me directly applicable to the present case. The company there declared and paid dividend at the maximum rate allowed by the company's special Act, and certified that income tax had been or would be paid, and the Courts held that the member of the company received a sum larger by the amount of the income tax than the maximum.

In the present case, in *Pratt's* case the same certificate was given, and in both cases in fact income tax was paid under Sch. D, pound for pound, out of the profits of the company.

In my opinion, the difference between r. 20 and s. 54 of the Act of 1842 is not material, but the decision in the House of Lords in *Neumann's* case (5) requires careful consideration. The basis of that decision is, in my opinion, that their Lordships there considered that the taxable profits of the company having been taxed under Sch. A, and dividends declared thereout less tax, the remainder of the actual profits which was specially segregated in a reserve fund could not be exceeded even for the purpose of the shareholders' sur-tax when it came to be divided, because it was all that remained, the rest of the profits having been comprehensively dealt with before. Lord Tomlin said in *Neumann's* case (6): "If a deduction from the gross sum was authorized but was not in fact made, as was the case here, there is in my opinion nothing in the language of the sub-section which entitles the Inland Revenue to treat the gross sum as being greater than in fact it was. From the income tax point of view it makes no difference to the revenue whether the deduction is made or not because the company does not have to account for what it deducts"; and Lord Wright said: "Such a case as the present is unusual, because a fund has been segregated and divided in toto; hence, if the company had deducted tax, it would have been from a gross amount, not of 5343*l.* 15*s.*, but of 4275*l.*, and equally, if the dividend had been 'tax free,' it would have been a dividend of the net amount after the appropriate deduction of tax had been made from the sum of 4275*l.*" They were, however, there dealing with the case on the footing that there had in fact been no deduction of income tax, that is to say, that the tax paid under Sch. A had for that purpose no connection with the specially segregated fund, but in the present cases the facts are quite different. The companies here, in paying income tax under Sch. D out of their profits pound for pound, and subsequently declaring dividends which absorbed only the remainder or part of the remainder of their profits, were in effect deducting income tax, or, as Buckley J. said in the *Ashton Gas Company's* case (1), relieving the shareholder from liability. Sect. 7, sub-s. 2, of the Act of 1931, then applies in terms. It may well be that if the company had distributed, not merely the remainder of their profits left over after payment of income tax, but a sum equal to the whole of their profits, the Finance Act, 1931, s. 7, sub-s. 2, would have had no application, because, as the House of Lords held in *Neumann's* case (2), to have added income tax to the total amount of the company's profits would have created a fictitious figure which never existed, and would have exceeded the fund available, nor could the dividend so declared be described as "tax free." A point was raised in *Pratt's* case that as the dividend paid absorbed practically the whole of the balance of profit available for distribution, s. 7, sub-s. 2, could not be applicable; but in my opinion there is no force in this contention, since the dividend paid only absorbed practically the whole balance after payment of income tax.

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(1) [1934] A. C. 215.

(2) [1923] A. C. 37.

(3) [1926] A. C. 289.

(4) [1906] A. C. 10.

(5) [1934] A. C. 215, 231.

(6) [1934] A. C. 214, 231, 242.

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(1) [1906] A. C. 10.

(2) [1934] A. C. 215.

For these reasons I hold that the appeals must be allowed.

Appeals allowed.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondents: *Linklaters & Paines; Romer, Skan & Brashier.*

F. P. F.

1936
May 22, 28.

BILSLAND *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Sur-tax—Avoidance—"Exceptional and not systematic"—One avoidance by a number of sales—Finance Act, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 33, *sub-ss.* 3, 4.

A company with a capital of 4000*l.*, divided into 3900 preference shares of 1*l.* each and 1000 ordinary shares of 2*s.* each, was in 1933 in a position to declare out of profits accumulated before July 5, 1932, a dividend of 100*l.* on each ordinary share. The appellant, who held the preference shares and all but forty of the ordinary shares, admittedly avoided sur-tax by selling all but five of his ordinary shares at 75*l.* each, to about forty persons, with the promise (which he could fulfil by exercising his voting rights in respect of the preference shares) that the company would declare a dividend. Many of the purchasers were employees of the company, and did not pay the purchase money till they received the dividends amounting to 75*l.* (100*l.* less income tax 25*l.*) which were immediately declared. The appellant having been assessed to sur-tax on the amount of the dividends as assets within the meaning of s. 33 of the Finance Act, 1927:—

Held, by Lawrence J., that though the dividends were assets falling into charge under that section, the appellant escaped under the proviso to sub-s. 4 in that the avoidance was "exceptional and not systematic." Those words refer primarily to number, and a single act of avoidance does not cease to be exceptional because it is planned or designed, nor because it is carried out by a number of sales.

CASE stated by the Special Commissioners of Income Tax.

Mr. John Bilsland (hereinafter called "the appellant") appealed against an additional assessment in the sum of

49,750*l.* made upon him for the purposes of sur-tax for the year to April 5, 1933. The assessment was made on the basis that the appellant was the holder of 995 ordinary shares in Electric Hare Greyhound Racing, Ld. (hereinafter called "the company"), on March 27, 1933, in respect of a dividend of 50*l.* per share on the said 995 2*s.* ordinary shares in the company, which dividend was declared on March 28, 1933.

The company was incorporated on May 30, 1927, with a capital of 4000*l.* divided into 3900 1*l.* preference shares and 1000 2*s.* ordinary shares, the voting rights being one vote for each preference share and one vote for every five ordinary shares. At the relevant period it carried on a greyhound racing track at Liverpool under a licence from Greyhound Racing Association (Liverpool), Ld.

At July 24, 1932, the shareholding so far as is relevant to this case was as follows:—

	Ordinary.	Preference.
Mr. Shand	333	1230
Mrs. Shand	181	610
Appellant	424	2040
Appellant's wife	22	20

The appellant was the registered holder of the remaining 40 ordinary shares in trust for a Miss Pinder until they were registered in her name on January 2, 1933.

As the result of a compromise of legal proceedings between Mr. Shand and the appellant, and an order of the Court dated July 5, 1932, the appellant purchased the whole of the ordinary and preference shares of Mr. and Mrs. Shand for 50,000*l.* To enable him to discharge such purchase price the appellant borrowed 35,000*l.* from the company and caused the said shares so purchased by him to be transferred into the name of Control Nominees, Ld., on the completion of the said purchase. As a result of the said agreement the appellant became entitled to 960 ordinary shares (including the 22 ordinary shares registered in the name of his wife).

When the appellant took over the shares of Mr. and Mrs. Shand he intended to form a public company and consulted an issuing house for that purpose, but as the question of the legality of totalisators on greyhound racing tracks was then before the Courts the flotation of the proposed public company was delayed, and when the decision of the Court declaring totalisators on greyhound racing tracks to be illegal was pronounced on December 16, 1932 (see *Shuttleworth* v. *Leeds Greyhound Association, Ld.* (1)), the proposal was abandoned.

After July, 1932, owing to the operation of a rival company the weekly takings decreased, but by March, 1933, the company was in a position to declare a dividend of 100,000*l.* (less income tax) out of accumulated profits made prior to July 25, 1932. In March, 1933, the assets of the company consisted in the main of the accumulated profits and of the value of the licence and equipment of the racing track and buildings thereon. The appellant required money to repay the company's loan, but realized that if the 100,000*l.* was distributed by way of dividend on the ordinary shares of the company the amount which he would receive after deduction therefrom of income tax would be insufficient to reimburse him the 50,000*l.* paid to Mr. and Mrs. Shand and the resulting sur-tax which he would be called upon to pay. The appellant therefore admittedly sought to avoid the payment of sur-tax by the disposal of 955 ordinary shares out of the 960 ordinary shares held by him. He suggested to certain persons that he was prepared to take 75*l.* for each ordinary share with a promise, which he could fulfil as being in control of the company by virtue of the voting rights attached to the preference shares which he retained, that a dividend should be paid. The whole of the 955 shares were actually sold to purchasers prior to March 28, 1933, and on March 28, 1933, a dividend of 50*l.* per share in respect of the company's year ended April 30, 1932, was declared. On April 18, 1933, a dividend of 50*l.* per share in respect of the company's year ended April 30, 1933, was declared, the two making a net dividend of 75*l.* per share (100*l.* less 25*l.* income tax).

There were about forty transferees, of whom nearly thirty, mostly weekly wage-earners, were employees of the company or of a dog racing company in Scotland. The arrangements for the transfer were verbal and there were no written agreements. It was admitted that the large majority of the purchasers could not have found the purchase money had they not been able to count upon the dividends, and that the appellant, who in most cases had paid the stamp duty, deducting it from the purchase price, had agreed to wait for the purchase money until the dividends were paid. No one purchaser paid the balance of the purchase price before the date of the second dividend, and in nearly every case the dividend warrants were endorsed over to the appellant in payment for the shares. The shares were registered in the names of the transferees between March 21 and March 27, 1933, and the certificates were prepared by the secretary of the company before the directors' meeting declaring the dividend on March 28, 1933. The dividends were returned for income tax purposes by the holders of the shares and in some cases for sur-tax purposes, the appellant paying the sur-tax for two shareholders.

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(1) [1933] 1 K. B. 400.

As mentioned above, the company had security for its loan to the appellant by a transfer of the shares in the name of Control Nominees, Ld. Evidence was given that in the necessary arrangements for the sale of the shares the appellant first took a transfer to himself from Control Nominees, Ld., before re-transferring, but the entries in the shares register described the transfers as being from Control Nominees, Ld., to the new holders to save labour.

No further dividends were declared by the company, which went into voluntary liquidation on March 21, 1934, the assets being sold to a new company with a capital of 20,000*l.* divided into 20,000 1*l.* shares, of which the appellant held 17,000. In the liquidation the holders of the ordinary shares had the option of applying for one share in the new company for every two shares held. Those who exercised the option received in addition to the shares 10*s.* 3*d.* in cash for each 2*s.* share held. Those who did not exercise the option received 1*l.* 0*s.* 3*d.* for each 2*s.* share. 23*s.* was distributed in respect of each preference share.

By reference to the foregoing circumstances in relation to the 955 ordinary shares so disposed of by the appellant the appellant had thereby avoided more than ten per cent. of the amount of sur-tax for each of the years 1931–2 and 1932–3 which would have been payable in his case if the income from the said shares had been deemed to accrue from day to day and had been apportioned accordingly and the income so deemed to have been apportioned to him had been treated as part of his total income for the purposes of sur-tax.

On behalf of the Crown it was contended :—

(*a*) That the appellant was beneficially entitled to the dividends on the said 955 ordinary shares and was therefore chargeable to sur-tax for the year 1932–3 in respect of the dividend declared on March 28, 1933.

(*b*) That alternatively, the said 955 ordinary shares were assets to which s. 33 of the Finance Act, 1927 (1), applied, the appellant had not proved that the avoidance of sur-tax was exceptional and not systematic, and therefore the income from the said shares must be deemed to have accrued from day to day and to have been apportioned to the appellant accordingly, and as so apportioned formed part of his total income for the purposes of assessment to sur-tax.

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(1) Finance Act, 1927, s. 33, sub-s. 3 : " If it appears to the Special Commissioners by reference to all the circumstances in relation to the assets of any such individual (including circumstances with respect to sales, purchases, dealings, contracts, arrangements, transfers, or any other transactions relating to such assets) that the individual has thereby avoided or would avoid more than ten per cent. of the amount of the super-tax for any year which would have been payable in his case if the income from those assets had been deemed to accrue from day to day and had been apportioned accordingly and the income so deemed to have been apportioned to him had been treated as part of his total income from all sources for the purposes of super-tax, then those assets shall be deemed to be assets to which subsection 4 of this section applies."

Sub-s. 4 : " For the purposes of assessment to super-tax in the case of any such individual, the income from any assets to which this subsection applies shall be deemed to accrue from day to day, and in the case of the sale or transfer of any such assets by or to him shall be deemed to have been received as and when it is deemed to have accrued :

Provided that an individual shall not be liable to be assessed to super-tax under this section in respect of any such income if he proves to the satisfaction of the Special Commissioners that the avoidance of super-tax was exceptional and not systematic, and that there was not in his case in any of the three next preceding years any such avoidance of super-tax as is described in the provisions of the last preceding subsection."

By s. 42, sub-s. 10, the provisions of the Income Tax Acts relating to super-tax were (with immaterial exceptions) continued as relating also to sur-tax.

On behalf of the appellant it was contended :—

(i.) That the transaction for the sale of the shares was a real transaction with no arrangement whereby the appellant retained any interest in the shares or in the said dividends.

(ii.) That the appellant disposed of his shares and received the purchase price as capital and not as dividend, and thereby the purchasers became the legal owners of the shares, depriving the appellant of any right to the income arising therefrom.

(iii.) That with regard to the contentions as to the imposition of the terms of s. 33 of the Finance Act, 1927, there was merely one act of avoidance—the disposal of the shares. Such a single transaction entered into for the first and only time in 1933 could not be designated as being other than exceptional and was not therefore part of a system. That there had not been any such avoidance in any of the three next preceding years. The proviso to sub-s. 4 of the section applied and the appellant did not therefore come within the wording of the section.

The Special Commissioners held that the sale of the shares was effective to deny to the appellant any beneficial interest in the dividends. They reserved their decision with regard to the point under s. 33 and subsequently issued their finding in writing as follows :—

" We hold that this case falls within the provisions of s. 33 of the Finance Act, 1927, and that the appellant is not an individual who has proved that the avoidance of sur-tax was exceptional and not systematic within the meaning of those words in the proviso to that section."

They held on the evidence that March 20, 1933, was the date on which the contract for the disposal of the shares was completed and they adjusted the assessment accordingly.

A. M. Latter K.C., H. P. Glover K.C., and *F. Heyworth Talbot* for the appellant. The first question is whether the shares sold by the appellant are within the definition, in sub-s. 3 of s. 33 of the Finance Act, 1927, of " assets to which sub-section 4 of this section applies." Sub-s. 3 could only apply if by effecting the sale the appellant had avoided paying the tax on dividends notionally accrued from day to day. But sale or no sale he would not have been assessable on such a basis; so he did not " thereby " avoid having to pay tax on income notionally accrued, and the section does not apply. Alternatively, if we are within sub-s. 3 we are taken out by the proviso to sub-s. 4. " Exceptional and not systematic " must be read as referring to the " avoidance " of tax and not to the transaction by which the tax is avoided.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The contention that sub-s. 3 of s. 33 does not cover the case was not argued before the Special Commissioners and makes nonsense of the whole provision. What the sub-section does is to assume a hypothetical situation in order to provide a basis upon which to estimate the avoidance of super-tax with which the section is dealing. The meaning and object of the sub-section is clear. With regard to the application of the proviso the taxpayer has to prove three separate facts: (*a*) that the avoidance was exceptional; (*b*) that it was not systematic, and (*c*) that there had been no avoidance of super-tax in any of the three preceding years. There was ample evidence upon which the Special Commissioners could find that the proof required in the proviso had not been satisfied.

A single avoidance may be " systematic " if it is planned and carried out by a series or system of separate transactions.

Latter K.C. in reply. You cannot tax without clear words imposing the charge. It is not permissible to read into the section words that are not there. The respondents' case on the proviso is based on an unnatural construction of the text.

Cur. adv. vult.

1936
Bilsland
v.
Inland
Revenue
Commissioners.

1936. May 28. Lawrence J. read the following judgment: There are two points in this case: (1.) Whether the shares sold by the appellant in the circumstances detailed in the case are assets to which sub-ss. 3 and 4 of s. 33 of the Finance Act, 1927, apply, and (2.) whether the proviso to sub-s. 4 of that section protects the appellant from liability to sur-tax on the income which he is deemed to have received from those assets.

On the first point it is contended for the appellant that the words of the sub-section are inapt to cover the present case, because if the income from the assets had accrued due from day to day the appellant could not by selling the assets have avoided the tax. In my opinion this argument is unsound. It omits the words "deemed to," and makes the sub-section practically meaningless. Of course, if the words are meaningless, the taxpayer would not be taxable, but in my opinion the words, though clumsy, have a meaning. The words "if the income had been deemed to accrue" are, in my view, introduced solely for the purpose of defining the amount of sur-tax which the taxpayer must have avoided in order to bring the assets in question into charge.

The words "super-tax which would have been payable if the income had been deemed to accrue" indicate that it was not so payable, and therefore relate the fact of avoidance to the notional accrual for the purpose of measuring the necessary amount of avoidance.

I am, however, of opinion that the appellant is entitled to succeed on the second point. In my opinion the words "exceptional and not systematic" in sub-s. 4 have relation primarily to number. To read the word "systematic" as meaning "planned" or "devised," as was contended for the Crown, appears to me impossible in the context. The more planned or devised the avoidance is, the more exceptional it is. Moreover, "exceptional" means, in my view, taken out of something; it cannot mean taken out of the ordinary rule. It must mean in this context taken out of the system, and that implies that there must be more than one instance in the system. It seems to me impossible to say fairly that a single avoidance of tax is systematic and not exceptional.

It was also, I think, faintly argued that the avoidance was not exceptional because it was carried out by a number of sales at the same time; but in my opinion this did not prevent the avoidance of the sur-tax for that one year being exceptional.

In my opinion the taxpayer has to prove that the admitted avoidance is exceptional and not systematic, that is to say, not part of a system of avoidances, and he must go further and prove that there has been no such avoidance within the last three years.

I am therefore of opinion that there was no evidence upon which the Commissioners could find that the avoidance in this case was not exceptional, and the appeal must be allowed with costs.

Appeal allowed.

Solicitors for appellant: *Blundell, Baker & Co., for Snowball, Kyffin Taylor & Pruddah, Liverpool.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. W. H.

1936
July 21, 22.

ENGLISH *v.* BLOOM AND THE LONDON PASSENGER TRANSPORT BOARD.

[1936. E. 562.]

SIEGENBERG *v.* BLOOM AND THE LONDON PASSENGER TRANSPORT BOARD.

[1936. S. 1460.]

[CONSOLIDATED.]

Costs—Actions by separate Plaintiffs against same Defendants—Consolidation—Payments into Court—Recovery by one Plaintiff of more and by the other Plaintiff of less than amount paid in in respect of his claim—Form of order as to costs.

Actions were commenced by E. and S. by separate writs issued by the same solicitors on the same date claiming damages against the same defendants in respect of personal injuries sustained in

1936

ENGLISH
v.
BLOOM
AND THE
LONDON
PASSENGER
TRANSPORT
BOARD.
SIEGENBERG
v.
SAME.

the same accident. After separate statements of claim and defences admitting liability had been delivered, the actions were consolidated. The defendants paid into Court 225*l.* in respect of E.'s claim, and 125*l.* in respect of S.'s claim.

S. recovered 185*l.*, 60*l.* more than the payment into Court, and E. recovered 200*l.*, 25*l.* less than the payment into Court:—

Held, (1.) that the question of suing on one writ or on separate writs was one for the discretion of the plaintiffs' solicitors;

(2.) that the proper order as to costs was as follows: Judgment for the plaintiff S. for 185*l.* and costs, including the costs of the consolidated action, except in so far as directly attributable to the claim of E. after the date of payment into Court. Order payment out to the plaintiff S. of the 125*l.* in Court in part satisfaction.

Judgment for the plaintiff E. for 200*l.* and costs up to the date of payment into Court. The plaintiff E. to pay to the defendants any costs of the consolidated action arising after the date of payment into Court which are directly attributable to his being a party to the consolidated action. Order payment out to defendants of 25*l.*, part of the sum of 225*l.* paid into Court. Order payment out to the plaintiff E. of 180*l.*, the remainder of the sum in Court to be dealt with according to the taxing-master's certificate.

ACTIONS tried before Singleton J.

The plaintiffs, Michael English and Joseph Siegenberg were passengers in a taxicab owned and driven by the first defendant, Jack Bloom. They claimed damages in respect of personal injuries sustained by them in a collision on March 20, 1936, between the taxicab and two tramcars owned by the second defendants, the London Passenger Transport Board. The same solicitors acting for both plaintiffs issued separate writs on May 4, 1936, and delivered separate statements of claim on May 25. A separate defence was delivered in each action on June 6, admitting negligence by both defendants. On June 16, on the summons for directions the two actions were consolidated, and on July 6 the defendants paid into Court 225*l.* in respect of the plaintiff English's claim and 125*l.* in respect of the plaintiff Siegenberg's claim.

At the trial on July 21 it was submitted that the defendants ought to have proceeded by one action instead of two from the start.

SINGLETON J. awarded 200*l.* to the plaintiff English and

1936

English v. Bloom and The London Passenger Transport Board. Siegenberg v. Same.

185*l*. to the plaintiff Siegenberg, and adjourned to the following day the question of costs.

F. W. Wallace for the plaintiffs. Under Order XVI. there is no duty on two quite separate plaintiffs to sue on one writ. [SINGLETON J. The solicitors were quite right. It is a matter for their discretion. There may be circumstances where separate writs are more convenient; for example, if one of the two plaintiffs has put them in funds and the other has not.]

It is submitted that the proper form of order as to costs is:

(1.) That the defendants do pay to the plaintiffs the costs to be taxed of both actions up to the date of consolidation.

(2.) The defendants to pay to the plaintiffs the costs to be taxed of the consolidated action from that date to the date of payment in.

(3.) The defendants to pay the plaintiffs' costs of the consolidated action after payment in, except where such costs have been increased by the plaintiff English's non-acceptance of the payment in.

(4.) The defendants to have their costs to be taxed of the consolidated action after payment in, but only so far as the same have been increased by the plaintiff English's non-acceptance of the payment in.

Ernest Hancock for the defendants. I agree that the question of one writ or two is in the discretion of the solicitors, and in view of your Lordship's intimation that they were entitled to issue two I do not press that, or ask for any relief in respect of it.

There appears to be no authority in point. The old Order XXII., r. 8, which was replaced by the present Order XXII. in 1933, dealt with the case of the same plaintiff suing two defendants, but not with the converse case of two plaintiffs suing the same defendants.

The position is the same as if the plaintiffs had been joined in one action from the beginning. There are two issues: (1.) To what damages is English entitled? (2.) To what damages is Siegenberg entitled?

1936

ENGLISH
v.
BLOOM
AND THE
LONDON
PASSENGER
TRANSPORT
BOARD.

SIEGENBERG
v.
SAME.

The payment in was not a general payment of one sum, but a separate payment in respect of the separate cause of action of each plaintiff. The payment in would have been bad if not so divided up. (*Smith* v. *Schilling*. (1)) The fact, therefore, that the aggregate damages (385*l.*) recovered by the plaintiffs exceeded the aggregate payments in (350*l.*) is irrelevant.

Siegenberg is admittedly entitled to his costs. It is submitted that as to English the order should be : "As from the date of payment in, the costs of the issue as to English to be paid by him to the defendants." Subject to that difference of wording—which may or may not prove to be of importance on taxation—I agree that the order proposed on behalf of the plaintiffs would have been correct under the old practice, and submit that it is so under the present practice.

SINGLETON J. The circumstances are a little unusual. There were originally two actions started on the same day, May 4, 1936. In one the plaintiff was Michael English, in the other Joseph Siegenberg. Those actions were both in respect of personal injuries which each of the plaintiffs claimed that he had sustained in an accident on March 20, 1936. Both the plaintiffs were passengers in a taxicab belonging to the first defendant, Jack Bloom, which became caught between two tramcars owned by the second defendants, the London Passenger Transport Board. Both defendants admitted that they were negligent, and the only question was what damages the plaintiffs were respectively entitled to recover.

It was suggested that only one writ should have been issued, but I see no reason why there should not be two writs. That must be left to the discretion of the solicitor, who in this instance was acting for both plaintiffs, and I have nothing before me to show that he acted improperly in issuing two writs.

Separate statements of claim were delivered on May 25, and separate defences on June 6. On June 16 the matter was before me on a summons for directions, and at the request of the defendants it was ordered that the actions should be consolidated, and consequential directions were given. On

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(1) [1928] 1 K. B. 429.

July 6 the defendants made certain payments into Court—in the case of English 225*l.*, with an admission of liability, and in the case of Siegenberg 125*l.* The case was tried before me yesterday, and after hearing evidence separately I gave judgment for English for 200*l.* damages, and for Siegenberg for 185*l.* damages. The amount recovered by English is thus 25*l.* less than was paid into Court in his case, while the amount recovered by Siegenberg is 60*l.* more. The matter stood over last night so that counsel might see if there was any authority on the question of costs in such a case. Both tell me that they are unable to find any authority in point.

I have to bear in mind two things: (1.) That the plaintiff who has succeeded and has recovered more than was paid into Court should be in no way prejudiced by the position of the plaintiff who has recovered less than was paid in; and (2.) that the defendants in the case of English paid in more than he recovered and they ought to have the benefit of that payment into Court.

In my opinion the proper form of order is as follows:

Judgment for the plaintiff Siegenberg for 185*l.* and costs, including the costs of the consolidated action, except in so far as directly attributable to the claim of English after the date of payment into Court. Order payment out to the plaintiff Siegenberg of the 125*l.* in Court in part satisfaction.

Judgment for the plaintiff English for 200*l.* and costs up to the date of payment into Court. The plaintiff English to pay to the defendants any costs of the consolidated action arising after the date of payment into Court which are directly attributable to his being a party to the consolidated action. Order payment out to the defendants of 25*l.* (part of the 225*l.* paid into Court by them in respect of the claim of the plaintiff English). Order payment out to the plaintiff English of 180*l.*, the remainder of the sum in Court to be dealt with according to the taxing-master's certificate.

Judgment for plaintiffs accordingly.

Solicitors for plaintiffs: *S. Rutter & Co.*

Solicitors for defendants: *Langford, Borrowdale & Thain.*

J. W. H.

IZZARD *v.* UNIVERSAL INSURANCE COMPANY, LIMITED.

C. A.
1936
July 28, 29, 30.

Insurance (motor)—Third-party liability—Insurance of owner of motor vehicle in respect of death of person caused by use thereof—Insurer not to be liable in respect of person carried other than passenger carried by reason of contract of employment—" Contract of employment" whether with insured person only or with any employer—Provisions in policy purporting to exclude personal risk—Validity—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 1 (*b*) (*i.*) (*ii.*).

The Road Traffic Act, 1930, s. 36, sub-s. 1, provides that in order to comply with the requirements of the part of the Act providing against third-party risks " a policy of insurance must be a policy which . . . . (*b*) insures such person . . . . as may be specified in the policy in respect of any liability which may be incurred by him . . . . in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road: Provided that such a policy shall not be required to cover—

(i.) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii.) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise."

A policy of insurance in respect of a motor vehicle was headed " Commercial motor vehicle policy." It incorporated a previous proposal by the insured in which he had given a warranty or undertaking that passenger risk was not to be covered, it contained in the schedule thereto a warranty that the vehicle should be used only for general haulage and other trades, and it purported to exempt the insurer from liability in respect of any accident caused whilst the vehicle was being used otherwise than for the purposes mentioned in the schedule. The policy further provided that the company would indemnify the insured against liability in respect of " Death of or bodily injury to any person caused by or arising out of the use of the vehicle . . . . Provided always that the company shall not be liable in respect of . . . . ; (*b*) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment; (*c*) Death of or bodily injury to any person (other than

C. A.
1936

Izzard
v.
Universal
Insurance
Co.

a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . . such vehicle" :—

Held, by Slesser and Scott L.JJ. (Greer L.J. dissenting), that the expression "contract of employment" in sub-clause (*c*) was limited to a contract of employment between a passenger whose death or injury was caused by the use of the vehicle and the insured, and that inasmuch as the heading of and warranties in the policy purported to eliminate passenger risk, the insurer was not liable to indemnify the insured against liability for the death of a passenger carried in the vehicle by reason of or in pursuance of a contract of employment with some person other than the insured.

Decision of MacKinnon J., ante, p. 303, reversed.

Appeal from a decision of MacKinnon J. (1) upon a special case stated by an arbitrator.

The facts as stated in the special case are set out in the report of the case in the Court below, and are sufficiently indicated in the headnote.

MacKinnon J. held that the expression "contract of employment" in proviso ii. of sub-s. 1 of s. 36 of the Road Traffic Act, 1930, and sub-clause (*c*) of the policy was not limited to a contract of employment between the deceased or injured passenger and the insured person, but applied to a contract of employment between such passenger and any employer; and that inasmuch as the Road Traffic Act, 1930, s. 36, made it obligatory, except as therein provided, that a policy against third-party risks should cover liability in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle, that notwithstanding that the heading of and warranties in the policy purported to eliminate passenger risk, the insurer was liable to indemnify the insured against liability for the death of a passenger carried in the vehicle by reason of or in pursuance of a contract of employment.

The insurance company appealed. The appeal was heard on July 28 and 29, when judgment was reserved and delivered on July 30.

A. T. Miller K.C., *Tristram Beresford K.C.*, and *C. N. Shawcross* for the insurance company, appellants.

(1) Ante, p. 303.

H. D. Samuels K.C. and *F. Soskice* for the claimant, respondent.

The arguments were substantially the same as those advanced in the Court below, except that *St. Helen's Colliery Co.* v. *Hewitson* (1) was relied upon by the appellants in support of their argument.

Cur. adv. vult.

1936. July 30. GREER L.J. This is an appeal from MacKinnon J.'s decision refusing to interfere, on a ground of law, with the decision of the arbitrator in a case which was concerned with the death of a man named Izzard, and the consequent action that was brought by his widow under Lord Campbell's Act, and the right which arises under the Third Parties (Rights against Insurers) Act, 1930, by reason of the defendant in the action having become bankrupt.

Shortly, the facts, as they are shown by the case, appear to me to be these. On July 21, 1934, the deceased man Izzard, who was a workman in the employ of a building company called Industrial Builders, Ld., was riding on a lorry which belonged to a man named Druce, who was a haulage contractor, and who carried on certain other businesses which are not for the moment material to state, when the lorry overturned. Izzard died on the next day, and his widow brought an action under Lord Campbell's Act against Druce, whose servant was driving the motor lorry in which Izzard was travelling. That action was decided in her favour, and she obtained a judgment for 850*l.* and costs against Druce. Unfortunately, Druce was a man who could not pay and he was made bankrupt under the judgment. In those circumstances, by virtue of the Third Parties (Rights against Insurers) Act, 1930, his rights against the insurance company, in which he had taken out a policy of insurance, were transferred to and vested in Mrs. Izzard. She then made a claim against the insurance company known as The Universal Automobile Insurance Company, Ld., under the rights which she had obtained by reason of the statute I have mentioned.

(1) [1924] A. C. 59.

Under a clause in the policy the matter had to be referred, and was referred, to arbitration. The claim was heard by a legal arbitrator of considerable knowledge and distinction, and he decided, both on the facts and on the law, in favour of the plaintiff. He was asked to state his judgment in the form of a special case and, in doing so, he recited the material documents and the facts of the case as he understood them. The special case came before MacKinnon J., and he decided that there was no ground for saying that the arbitrator was wrong in law in what he had done.

The documents begin, as they always do in insurance cases, with an application form dated November 16, 1933, and in that application form the insured was asked whether he wanted passenger risk to be covered and he answered "No." I do not understand that to mean that he did not want cover against the sort of passengers who were dealt with in the Road Traffic Act of 1930. I think what he meant, and what he was understood by the insurance company to mean, was: I want an insurance for the purposes of my businesses which will be in accordance with the insurance I am obliged under penalties to take out under the Road Traffic Act, 1930. That it was so understood by the insurance company I think there can be no doubt, because they gave him a policy which follows, in effect, the wording of the Road Traffic Act, and purports to insure him against two classes of passengers. The two classes I will deal with presently, but there are other matters to be considered before we get to that point. In the application form the applicant declares: "I agree to accept a policy of insurance according to the above proposals subject to the terms, exceptions and conditions to be expressed in and on the policy." So he is making a declaration for the usual policy with such terms, exceptions and conditions as are expressed in the policy, and the policy may, of course, in terms, negative that which is stated in the application form, even though the application form is deemed to be the basis of the insurance.

In order to consider the policy, I find it necessary, in the first instance, to refer to the relevant provisions of the

Road Traffic Act, 1930, which, whether or not they were known to Mr. Druce, must have been well known to the insurance company who are dealing every day with insurances, and they have a particular form which does not include passenger risks but which does include matters in respect of which every person is bound, under heavy penalties, to take out a policy before he uses his motor vehicle. Sect. 35, sub-s. 1, says: "It shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act." The Act was passed for the particular purpose of giving to third parties who suffer injury through the negligence of servants of insured persons certain rights which they would not have had if this Act had not been passed, by making it clear that persons using motor vehicles on roads were under an obligation to obtain a policy which would cover third-party risks, with certain possible exceptions in the case of a vehicle that was not used for passengers.

Sect. 36, sub-s. 1, says: "In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—(*a*) is issued by a person who is an authorised insurer within the meaning of this Part of this Act." That part is immaterial. Then it goes on to say: "(*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road." Those words, of course, would be ample to cover injury to a passenger on the vehicle if it had not been for the proviso. The proviso is in these words: "Provided that such a policy shall not be required to cover—(i.) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment." That seems to me to mean that though there is a general obligation to take out a policy in respect of all persons to whom damage is caused by the negligent use of the vehicle on the road, that does not apply to cases in which a person in the employment of the insured has a claim against him under the Workmen's Compensation Act, the reason being that, in their wisdom, Parliament have said that if an insured person is already under an obligation, by reason of the Workmen's Compensation Act, to pay compensation to a man who is injured, he shall not be under any obligation to insure for damage which may be occasioned to such person by the negligence of the servants of the insured person. Then the proviso goes on: " (ii.) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise." That is to say, there is no general obligation to insure against damage to persons who are passengers, with this exception, that if the passenger is a person carried for hire or reward or in pursuance of a contract of employment, then the insurance is to cover that case even though there is no cover for passengers generally. I understand the statute and the policy to mean that there must be a compulsory insurance in respect of two classes of passengers, (1.) where the passengers are carried for hire or reward, and (2.) persons who are passengers carried by reason of or in pursuance of a contract of employment. That the effect of the statute was so understood by the insurance company is perfectly clear, because they have a printed form, the object of which is to present the insured with a policy of insurance which will comply with his obligations under the Road Traffic Act, 1930.

That application having come before the insurers, they issued a policy, and the policy recites that whereas application has been made for the insurance hereinafter contained and whereas the premium has been paid "Now this Policy witnesseth that subject to the terms exceptions and conditions contained herein or of any endorsement hereon"—then there follows a schedule with particulars describing the business or occupation of Druce as that of a haulage contractor, dairyman, sand and gravel merchant, coal merchant and farmer, and at the end of the schedule: "Warranted used only for general haulage and other trades." Probably the words "other trades" mean the other trades mentioned above as being carried on by the insured. There is a special Section in the policy dealing with liability to third parties, and it is to that special Section dealing with liability to third parties that one has to look for the promise of indemnity made by the insurers to the insured. The promise of indemnity is in this form: "The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of:—Death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the Schedule hereto (including the loading and/or unloading of such vehicle)." The description in the schedule is: "Fordson Truck. Warranted used only for general haulage and other trades." Then it goes on to exclude from that general obligation matters which the insured is entitled to have excluded by reason of the provisions of the Road Traffic Act, 1930. The material ones are (*b*) and (*c*). (*b*) says: "Provided always that the company shall not be liable in respect of:—. . . . (*b*) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment." That excludes from the area covered by the promise of indemnity the case of the death of or injury to any person who is in the employment of the insured to whom the insured owes obligations imposed upon employers by the Workmen's Compensation Act in respect of injuries arising out of and in the course of such employment. Then proviso (*c*) excludes from the promise of indemnity: "Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises." If one of Druce's men had been injured or killed in the course of the accident that happened to the lorry on July 21, 1934, notwithstanding the fact that this is not an insurance of passengers, the insured would quite clearly, in my judgment, be entitled to say: "I come within the terms of the indemnity and I am not excluded by reason of the proviso." But here we are not concerned with the death of a man who was in the employment of the insured. We are concerned with the death of a man who was not in the employment of the insured. Proviso (*c*), as it stands, would be wide enough to cover the case of Izzard, because he was on the vehicle at the time of the occurrence of the event out of which the claim arose; but the exclusion of liability is subject to an exception from that exclusion, which is put in brackets: "other than a passenger carried by reason of or in pursuance of a contract of employment." If a passenger is within that description, then he is not excluded by the proviso but is included in the general promise of indemnity, and the main question, if not the sole question, in this action—certainly what MacKinnon J. considered the sole question he had to determine—is whether or not Izzard, the deceased man, came under the words: "a passenger carried by reason of or in pursuance of a contract of employment." I read that exception as if it was equivalent to this: "Provided that the insured will be indemnified in respect of a passenger carried by reason of or in pursuance of a contract of employment."

The main argument addressed to us by Mr. Miller, apart from what he said in reply, was that that proviso in the policy ought to be read as referring only to passengers carried by reason of or in pursuance of a contract of employment with the insured. Now I do not so read it. I think the policy in sub-para. (*b*) has been expressly dealing with the persons in the employment of the insured, and when sub-para. (*b*) is concluded the policy has finished dealing with persons who are in the employ of the insured and directs itself to another subject—namely, the subject of passengers carried by reason of or in pursuance of a contract of employment. The omission of the words "in the employment of the insured" convinces me that the section is dealing with passengers of a kind different from the passengers that had been dealt with in sub-para. (*b*). If it had been intended to confine the insurance to passengers who were being carried in pursuance of a contract of employment with the owner of the vehicle, it would have been so stated so that there would be no doubt about it. In my judgment, the learned judge was right in construing this clause as applying to any passenger who was being carried by reason of or in pursuance of a contract of employment with his employer.

Now as regards the facts of this case, it is quite clear that the deceased man Izzard was being carried on this lorry in pursuance of his contract of employment, his contract of employment having given him a right to use the privilege of riding back to his home on the lorry in question. The business of the haulage contractor, Druce, had been usually carried on at Didcot, and the business of the building company had been usually carried on at Didcot. The haulage work had been done by Druce for the building company in the neighbourhood of Didcot for a very long time, and nowhere else; it did not call for haulage over very long distances. But there came a time when the building company accepted a contract for doing certain building work, or part of certain building work, at Coventry, which was a long way off, and it was therefore necessary for the haulage contractor to provide how that work was to be done. It was to be done by means of the lorries which previously had been used for the haulage work, and those lorries, moreover, in order that they might do the work, would have to go to Coventry. The mere fact that on the way to Coventry or on the way back they were empty and were not carrying goods would not prevent the work they were doing being within the description of "general haulage work," because it is obvious that there must be many times when a man carrying on a haulage business has his lorries driven when they are empty. They may have to pick up a load at A, take it to B, discharge it at B and then go another journey to C, and pick up a load at C, and during the whole time, whether they have goods on board the lorry or not, they are doing haulage work; they are doing that which is the business of a general haulier. I think that when the lorries were going to Coventry at the beginning of each week, whether they had goods on board or not, they were doing haulage work, and when they were coming back for the purpose of bringing home the lorries to where they were usually garaged and where their usual repairs would be done, they were doing haulage work.

Unfortunately, the case is not quite as specific as I should have liked it to be with regard to the facts. As regards the presence of Izzard and the other employees of the building contractor, we find this stated in para. 8: "By a verbal contract made in or about the month of April, 1934, between the said Industrial Builders Limited (then developing a building estate at Coventry) and the said William Druce, the said William Druce agreed to do haulage work for the said Industrial Builders Limited between Didcot and Coventry and at Coventry"—so the haulage work was to be between Didcot and Coventry and at Coventry—"and to put a lorry at the disposal of the said Industrial Builders Limited for the conveyance of workmen from Coventry to Didcot and from Didcot to Coventry at the week-ends, the terms of payment for the journeys between Didcot and Coventry being thirty-five shillings per journey whether men were carried on the lorry or not." I read that as meaning that the verbal contract was an added term to the contract for haulage, which was the contract between Druce and Industrial Builders, Ld. The haulage included the journey from Didcot to Coventry and the return journey at the week-ends from Coventry to Didcot, and some of the lorries that were used for the purposes of haulage were to be at the disposal of Industrial Builders, Ld., in order that their workmen could get to their homes at Didcot at the week-end. I do not know, because it is not stated clearly, whether or not the lorry to which this accident happened was one of the lorries which had been used during the week for the purposes of haulage; but from the fact that the learned arbitrator decided the case in favour of the applicant, Mrs. Izzard, I think we are entitled to assume that he did find as a fact that it was one of the haulage wagons that met with the accident which resulted in the death of Izzard.

There are one or two other matters in respect of which I should have liked a plainer statement of what the findings of fact of the learned arbitrator were. He says in para. 10 what the contentions were for the respondents, the insurance company: "That the words contained in the said proposal form 'Is passenger risk to be covered?' 'No.' constituted a warranty that the said commercial motor vehicle would not be used for carrying passengers and that, notwithstanding anything contained in the said policy, the said William Druce was not covered by the respondents for the carriage of the said Bernard George Izzard in the said commercial motor vehicle. (*b*) That the said commercial motor vehicle on the 21st day of July, 1934, was being used otherwise than for the purpose mentioned in the schedule of the said policy." That is a mixed question of law and fact, and I should prefer to have had a definite statement by the learned arbitrator that the lorry in question was one which had been used for the purposes of the haulage contract. All he says about it is: "Subject to the opinion of the Court I am of the opinion that the respondents' contentions are incorrect." They might be incorrect merely in law or incorrect in something which was a mixed question of fact and law, but I understand his final decision as meaning that this lorry that met with the collision which occasioned the death of Izzard was one of the haulage lorries. I myself always prefer a case to state separately what the arbitrator's findings of fact are and his decision upon those findings and then to ask the question whether, as a matter of law, his decision was right or wrong; but it is not so stated. It is stated as to whether his findings are correct, which means, I think, correct in law, and if they are correct in law the findings, so far as they deal with facts, cannot in any way be interfered with.

I have dealt with the substance of the matter, but there is one argument on the policy that was stressed, especially in his reply, by Mr. Miller, on behalf of the insurance company, when he relied on certain general exceptions of the policy. I do not accept the view that those general exceptions can be relied upon as cutting down the expressed promise in regard to liability to third parties contained in Section II. of the policy, but in any case I do not think they apply, for this reason. One of the general exceptions is: "The Company shall not be liable in respect of:—(1.) Any accident injury loss damage and/or liability caused sustained or incurred whilst such vehicle is:—(*a*) Engaged in racing pacemaking reliability trial or speed testing or whilst it is being used otherwise than for the purposes mentioned in the Schedule hereto or is drawing any trailer or is being used for hire or reward." I am not satisfied that any case was made on that point before the arbitrator, although it does appear on the face of the case, as he states it, that we have to deal with it. I look at the description of the use which the insured says in the schedule he is going to put his lorries to, and he says: "General haulage and other trades." In my judgment, we must treat the arbitrator's finding as a finding that the lorry in question was being used for general haulage, and no less so because at the time of the accident it was going to the garage for the week-end and going home, so far as we know, without any load upon it, but only with the workmen who were travelling in it to their homes, in accordance with the agreement. It is quite plain that Industrial Builders, Ld., had made an agreement with Izzard that he would be entitled to travel on this lorry, and that Druce and Industrial Builders, Ld., had made an agreement under which, for the convenience of the carrying out of the haulage work, permission should be given to the employers to give their workmen the right of travelling home at week-ends upon the lorry.

Then something was said about the latter words of the general exception, "or is drawing any trailer or is being used for hire or reward." That is an argument which does not impress me at all, because whenever a lorry, whether full or empty, is going on any of its journeys, it is being used for hire or reward, and it cannot be meant by that exception that because it is being used for hire or reward therefore it must be excluded from the indemnity which is expressly stated in Section II. in reference to the liability to third parties.

For these reasons I agree with the learned judge, MacKinnon J., and with the arbitrator, that the claimant was entitled to succeed in the arbitration and to be paid the sum of 850*l.* under the terms of the policy of insurance taken out by Druce. The appeal, therefore, so far as my judgment is concerned, should be dismissed with costs.

I ought to have stated with regard to sub-para. (*c*) of the Section dealing with liability to third parties that I regard it as applying only to workmen who are being carried as passengers and not to other people who are not workmen.

Slesser L.J. The decision in this case turns upon the interpretation of a policy of insurance and the relevant documents connected therewith, because what has to be shown by the present claimant in order that she may succeed is that the deceased was one of the persons covered by the insurance issued to Druce.

In my opinion, although it may be useful to consider the provisions of the Road Traffic Act, 1930, particularly ss. 35 and 36, it would not be right, in construing this policy, to have regard to the actual terms of that Act except in so far as the knowledge of the provisions of that Act may be material in ascertaining the surrounding circumstances in which this policy was issued. Sect. 35 puts an obligation upon persons who use motor vehicles on the road to comply with certain requirements in respect of insurance policies, and those requirements are stated in s. 36. If this particular policy does not satisfy those requirements, it may be that Druce has committed an offence, or failed to do that which the Road Traffic Act required him to do.

Primarily, we have to consider here what was the contractual relation between Druce, on the one hand, and the Universal Insurance Company, on the other, and that contractual relation is contained in the terms of the policy itself. As a matter of fact, little difference arises in the present case, because the policy contains in its exceptions and obligations substantially the language of s. 36 of the statute.

At the outset, it is important to observe that in the proposal form, in answer to the question whether passenger risk was to be covered, the applicant for the insurance answered " No," and clearly, so far as the proposal form was concerned, he did not ask to be insured against passenger risks, and he paid his premium on the basis that passenger risks were not to be covered. Nevertheless, when the policy itself is regarded, it is clear, to my mind, that certain passenger risks are covered, and the question which has to be considered is whether this particular passenger risk which was here incurred was or was not covered. Yet I think it is material to remember at the outset that the proposal form, which is by incorporation declared to be the basis of the contract, was one which was not to cover passenger risks.

The liability to third parties, which is contained in Section II. of the policy, Clause 1, provides that " the company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of :—Death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule hereto." That indemnity by itself, if there were nothing more, would include an indemnity to a passenger upon the vehicle, because such a person would or might be injured in an accident arising out of the use of the vehicle ; but there is to that general liability a series of provisos, and sub-para. (*c*) of the provisos has the effect, in my opinion, of excluding most passengers from cover under the policy. That proviso is as follows : " Provided always that the company shall not be liable in respect of :—. . . . (*c*) death of . . . . any person "—I omit the exception to the exception —" being carried in or upon . . . . such vehicle at the time of the occurrence of the event out of which any claim arises." It follows, therefore, that were there no other words, Mr. Izzard being a passenger who was killed while being carried in the vehicle, the insurance company, notwithstanding the general indemnity, for the " death of . . . . any person caused by or arising out of the use of the vehicle," would be excluded from liability by reason of those words of proviso (*c*).

Now it is said that proviso (*c*) contains certain words which make the insurance company liable for persons such as Mr. Izzard. Having provided that the company shall not be liable in respect of passengers, as I have related, these words appear in brackets in the middle of proviso (*c*), " other than a passenger carried by reason of or in pursuance of a contract of employment." Can it be said here that Mr. Izzard was " a passenger carried by reason of or in pursuance of a contract of employment "? The fact is that Mr. Izzard was being carried by reason of or in pursuance of a contract of employment in one sense; that is to say, he was employed by a third party, The Industrial Builders, Ld., and was at the time of the accident one of their employees; but he was not at the time of his death under a contract of employment with the insured, and the question which has to be determined is whether those words, " other than a passenger carried by reason of or in pursuance of a contract of employment," are apt words to apply not only to a person carried in pursuance of a contract of employment with the insured, but also to a person carried in pursuance of a contract of employment with somebody else.

There is, in my view, not very much assistance to be obtained from another clause to which reference was made, sub-clause (*b*) of clause 1; but this case has been argued in part upon the effect of sub-clause (*b*) on the interpretation of sub-clause (*c*), and therefore I refer to it. Sub-clause (*b*) excludes from liability the death of any person in the employ of the insured arising out of and in the course of such employment. It will be noticed, in the first place, that there is no reference at all to passengers in sub-clause (*b*). It is general in its terms, and if it be shown that the death arose out of and in the course of the employment, it would appear that the company in such a case would not be liable. Nor, in my opinion, can it be limited to cases which come within the ambit of the Workmen's Compensation Act. There may be persons whose deaths arise out of and in the course of their employment, but, by reason of the magnitude of their earnings or the casual nature of their employment, or other exceptions enumerated in the Workmen's Compensation Act, do not come within the ambit of that Act at all, yet nevertheless sub-para. (*b*) does provide that the company shall not be liable " in respect of the death of or bodily injury to any person in the employment of the insured arising out of or in the course of such employment." To take an illustration, a non-manual worker earning a wage higher than that which qualifies for compensation under the Workmen's Compensation Act might be said to have sustained death arising out of or in the course of the employment by the insured. Such a person would not, however, receive compensation under the Workmen's Compensation Act. Therefore, I do not think it is right to say that sub-para. (*b*) is limited to cases under the Workmen's Compensation Act, but it is limited to cases where death arises out of and in the course of the employment. From this I come to the conclusion that any argument which is based upon a contrast between persons covered by the Workmen's Compensation Act and persons not so covered is fallacious, because the first stage of the argument fails. If sub-para. (*b*) had referred in terms to the Workmen's Compensation Act something might have been made of that argument. In my opinion, for the reasons I have stated, it does not so do.

I think therefore that sub-para. (*c*) must be construed in its proper meaning, apart altogether from any assistance derived from the contemplation of sub-para. (*b*).

In the first place, I would make this observation, that in sub-para. (*c*) the words, " other than a passenger carried by reason of or in pursuance of a contract of employment," contemplate that a person may be carried by reason of or in pursuance of a contract of employment with the insured. Such a person, for example, as is indicated in the case of *St. Helen's Colliery Co.* v. *Hewitson.* (1) There, a workman was employed at a colliery and was injured in a railway accident while travelling in a special colliers' train from his work to his home. There was an agreement between the colliery company and the railway company by which the railway company agreed to provide special trains, and workmen who desired to travel by these trains signed an agreement with the railway company releasing them from all claims in case of accident, and the railway company provided the men with passes and charged them sums representing less than the full amount of the agreed fare. On the question whether such a man, being injured, could successfully sue the employers, the St. Helen's Colliery Company, it was decided that he could not. It was found that the accident did not arise out of and in the course of his employment, but that, in the language of Lord Buckmaster (2), " it was an implied term of the contract of service that the train should be provided by the employers," though the man had the choice, as in this case, whether he would or would not use the vehicle.

Such a case would appear to me to fall within sub-para. (*c*). It would be a case of a passenger carried by reason of or in pursuance of a contract of employment, but not being a person whose injury arose out of and in the course of the employment, it would not be defeated by sub-para. (*b*). Therefore, in my opinion, if the employers in *Hewitson's* case (1) had been insured under a policy like this in respect of the unfortunate workman, such a man would have been covered by the provisions of sub-para. (*c*), not being excluded by sub-para. (*b*). That seems to me to afford a meaning to sub-para. (*c*). So, also, here, I am of

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(1) [1924] A. C. 59.

(2) Ibid. 66.

C. A.
1936

Izzard
v.
Universal
Insurance
Co.

Slesser L.J.

opinion that had this deceased man been employed by Druce, and a lorry had been provided in the way suggested, he having an option whether he would use it or not, he would be a person who, while being so carried, had met his death by reason of or in pursuance of a contract of employment, for were it not for his contract of employment he would not have been offered the use of a lorry to carry him home at week-ends, as para. A of the case stated says a lorry was to be at his disposal if he desired to go home to Didcot at week-ends. Such a person would, I think, clearly fall within the ambit of sub-para. (*c*). Therefore, that in itself affords a meaning and a purpose to sub-para. (*c*), and also a meaning to that provision in the statute.

But the case here has to be carried further. It is said here that Mr. Izzard is covered by these words because he was under a contract of employment, which contract of employment, it is stated, did not exist between himself and Druce who was carrying him. I do not think it is possible to say that he was being carried in pursuance of a contract of employment between himself and Druce. He was being carried in consequence of a contract of employment, as para. A of the case stated recites, " between the said Industrial Builders, Ld., and the said Bernard George Izzard." It was because of that contract of employment, and not because of any contract of employment between him and Druce, who, indeed, had no direct nexus of employment with him at all, that he was being carried.

It is true that the words, taken in one sense, are wide enough to cover such a case; but I cannot myself think that it was the intention of the parties, as expressed in the language in which they have reduced their agreement, that such a situation should arise.

The view which Mr. Samuels presents for our consideration would produce this result, that whenever Druce, assuming he is engaged in haulage work (about which I will say something in a moment), takes up a passenger who has a contract of employment with any other person in the world, such a person would be a passenger, if he sustained death, covered by this sub-para. (*c*). With every respect to my Lord's view, I cannot see any justification for limiting the word " passenger " in that context to a workman. It says, " a passenger carried by reason of or in pursuance of a contract of employment."

I think some limitation must be put, and must have been intended by the language of the policy to be put, upon those words. Having regard to the fact that these two parties have contracted by the proposal form that there should be no passenger risk insured, having regard to the fact that the proposal form is made part of the insurance, and having regard to the fact that the contract is one made between the insured and the insurance company, I think the term " contract of employment " must be taken to mean a contract of employment to which the insured is himself a party.

If that is the right view of those words, it follows that this appeal must succeed, because Mr. Izzard was not being carried as a passenger by reason of or in pursuance of a contract of employment between himself and Druce. He was being carried by reason of a contract of employment with a third party.

The case is not an easy one, and the language, as so often happens in these policies, is difficult of construction. As I have said, even if one is driven to look at the circumstance that this policy was entered into to satisfy the requirements of the Road Traffic Act, one gets no assistance at all from the Act, because exactly the same language is used in the proviso to s. 36, sub-s. 1 (*b*) (ii.), and the same problem arises as to the meaning of the words " contract of employment." I have said enough to show that in my opinion those words have been used to cover the case of men employed by the insured, who, for one reason or another, are not struck at under sub-para. (*b*), but are persons who, though their carriage does not arise out of or in the course of their employment, are carried by reason of or in pursuance of a contract of employment. Apart from niceties, some of which I have indicated, the probability is that the intention of sub-para. (*b*), though it is not properly expressed, was to cover what, broadly speaking, may be called " Workmen's Compensation cases," and the intention of sub-para. (*c*) may have been to cover cases like

C. A.
1936

Izzard
v.
Universal
Insurance
Co.

Slesser L.J.

Hewitson (1) and the later case of *Taylor* v. *Sir Robert McAlpine & Sons, Ld.* (2), where an arrangement is made between third parties and the employer that the workmen of the employer shall be carried by the third party, two cases in which, when an accident occurs, it cannot properly be said it arises out of and in the course of the employment. That seems to me to provide a sufficient meaning to sub-para. (*c*), which we have here to construe.

There remains the further argument of Mr. Miller that in any case this vehicle was not engaged upon haulage work at the time of this accident and, therefore, the basic condition of the policy was never satisfied, or, alternatively, it was within the general exception ; that is to say, it is a case where the insurance company is not liable because the vehicle was being used for hire or reward. As my Lord has rather indicated, the two questions are very closely allied.

On this matter I am not prepared to differ from what must, I think, have been assumed by MacKinnon J. and by the learned arbitrator, and stated with approval by my Lord as the proper inference to be drawn from the findings in para. 8 of the case. It being stated that there was a contract by which haulage work was to be done between Coventry and Didcot and at Coventry, and also that a lorry should be at the disposal of the said Industrial Builders, Ld., for the conveyance of workmen from Coventry to Didcot and from Didcot to Coventry at the week-ends, I think the whole matter of bringing the workmen to and fro does sufficiently come within the warranty that the vehicle is to be used for " general haulage and other trades," though at times the particular vehicle was empty. I would assume, in the absence of any finding to the contrary, the learned arbitrator having found in favour of the claimant, that in all probability the vehicles which were used for the purpose of carrying these workmen were the identical vehicles which were used either immediately before or generally for the purpose of haulage.

Had the matter, therefore, remained on Mr. Miller's second argument with regard to haulage, and also with regard to hire or reward—because I think the hire or reward was merely the consideration for the whole contract moving between Industrial Builders, Ld., and the insured—I should have come to the conclusion that this appeal should have failed. But I think this appeal succeeds because, in my judgment, Izzard was not a passenger carried by reason of or in pursuance of a contract of employment. For the reasons I have stated, I think, therefore, the insurance company, as appears in their proviso to clause 1 of Section II., were not liable for the death of Izzard because, not being within those words in the brackets, he falls within the general exception to the liability in the proviso, and so is a person whom the insurance company never contracted to cover.

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(1) [1924] A. C. 59.

(2) (1924) 17 B. W. C. C. 26.

In my opinion, therefore, this appeal should be allowed.

Scott L.J. This, like many questions of interpretation of a document, is a case of considerable difficulty. I in fact share the view which has just been expressed by Slesser L.J., but I differ from MacKinnon J. and Greer L.J. with considerable diffidence.

The one and only question is whether the claim is within the policy. The question whether, if it is not within the policy, a breach of the Road Traffic Act, 1930, has been committed by the insured, is irrelevant. It does not affect any issue upon which the appeal depends. The statute, indeed, has no relevance except in so far as the statutory duty imposed by it upon the insured was a surrounding circumstance which both parties must be taken to have had in mind, and which the insured must be presumed to have intended to fulfil. This, like all evidence of surrounding circumstances, is naturally material to interpret the written contract where its meaning is doubtful.

The only question of fact that calls for consideration is the nature of the relationship between the insured and Izzard and, perhaps, the manner in which the motor lorry was used. I agree with the conclusion of my brethren on that last point, that the lorry was in fact being brought back to Didcot, like a cargo ship, so to speak, to its home port, at the end of the week's haulage work, which was at Coventry. If I may continue my nautical metaphor, instead of bringing the ship back in ballast, it was converted into a passenger ship and chartered for a lump sum freight to Industrial Builders, Ld., for the carriage of their men to Didcot. Those, I think, are the facts that are material as regards the lorry.

As regards the relationship between Izzard and the insured, he was a complete stranger for all purposes to the insured, and he was in no relationship at all material to any question in the case except to and with his employers, the building company.

In order to see what was the insured's duty under the Act, as a surrounding circumstance to be borne in mind in construing the policy, we have to construe s. 36, sub-s. 1, of the Act. We must construe it with care, because the policy was taken out under a statutory obligation to insure and therefore presumably with the intention of complying with the Act. The statute, as it seems to me, under proviso (i.) of s. 36, sub-s. 1, does not make it essential to cover by insurance the liability to persons where they are in a position to recover workmen's compensation, but does provide, inferentially, that they must be covered against accidents, where they cannot obtain workmen's compensation. In that respect, I entirely agree with what Slesser L.J. has said, and think that cases like *Hewitson's* case (1) illustrate the kind of contingency that may have been in the mind of Parliament. Passengers in or upon the insured's motor vehicle are not within the compulsion of the statute, and there is no duty to insure against liability to them unless they are passengers either (*a*) being "carried for hire or reward," or (*b*) they are being "carried by reason of or in pursuance of a contract of employment." In each of those cases, the statute says there is a duty to see that the policy covers liability to them, although they are passengers. On the words "except in the case of a vehicle in which passengers are carried for hire or reward," it seems plain to me that it is carriage by the insured

(1) [1924] A. C. 59.

which is meant. The second point is that where the proviso says "for hire or reward," it must mean payable to the insured. The contract of employment there referred to must, on a parity of reasoning, mean a contract to which the insured is a party. The whole conception of the proviso seems to me to be directed to matters in which the insured is directly concerned and over which, it is assumed, he has or has had some control, in that he is contractually interested in the matter.

Broadly, my reasons can be put under two heads. The first is the grammatical reason: passengers being carried by the insured for reward to him in pursuance of a contract with whom ?—with him. It seems to me contrary to common sense to suppose that he could know anything at all about contracts of employment made by persons who happened to be on his vehicle with some other people as employers. He can only be assumed to know about those persons who are in contractual relationship with him. Why should he have his duties altered merely because of the possibility of contractual relations that particular passengers may have made with other people ?

Secondly, unless an express exception is made to the general exception of passengers from the obligation imposed by the statute upon the insured, which will give those of the insured's own employees who have no right to workmen's compensation the protection of the policy, those employees will be left out in the cold altogether, and on that I agree with what Slesser L.J. has said. I cannot think it is consonant with a sensible interpretation of the statute to suppose that we were intended by Parliament to construe these words as meaning (and I do not think Greer L.J. suggested it): "in pursuance of a contract of employment, whether with the insured or some other person." I think we must choose between "contract with the insured" on the one hand and "contract with other parties" on the other hand, and if the insured's own employees who cannot recover compensation would be left outside the protection of this Act by the latter interpretation, we must reject it, and construe the words "contract of employment" as meaning "employment with the insured." For these reasons, it seems to me that that is the correct interpretation of the statute.

The interpretation of the statute does not conclude the matter, though, from one point of view, it goes a long way towards doing so. The interpretation of the policy is the problem, and that problem divides itself, in my mind, into two questions. One is, what is the ambit of the policy? On that, my view is a very clear one, that the proposal form, which is incorporated in the contract for all purposes as part of the contract and is, indeed, a basic part of the contract by reason of the language of the policy, is an essential document for the purpose of deciding what is the ambit of the policy. One must remember that the proposal is quite truly, in the language of contract, a proposal. It is an offer by the insured to the company, saying, "I will insure with you on these terms if you are willing," and the issue of the policy is the acceptance of that proposal. When it is so accepted by the issue of a policy, which incorporates the proposal, it is put beyond all doubt that the intention of the insurer is not to introduce a new term differing from the offer of the insured, but rather to accept that offer in accordance with its plain meaning. The case of *In re Morgan and Provincial Insurance Co.* (1) has made it quite clear—I think it was clear before on the earlier cases, but at any rate it is clear now—that the description in the policy of the purpose for which it is issued is to be read as a definition of "the ambit of the insurance," or "the scope of the risk," whichever expression one likes to adopt. Scrutton L.J.'s judgment in *Morgan's* case (2), in my view, is a complete discussion of the principles involved and of the cases that are relevant to the discussion, and makes it unnecessary for me to go into them; I not only follow that judgment (which, of course, is binding upon this Court as a judgment) but adopt what the learned Lord Justice said by way of reasoning in coming to the conclusion to which he did come. The gist of that conclusion, as I see it, is this, that the description or definition of the

(1) [1932] 2 K. B. 70.

(2) Ibid. 78–83.

risk—what I call the ambit of the insurance—is the dominant term of the bargain. Unless there is something in the clauses of the policy itself to show that that ambit is extended beyond what it is described to be in the main descriptive passages of the proposal and the policy, and unless that extension appears in absolutely clear language, I think you must interpret the policy as limited to the ambit so described.

On the question whether there is any term which extends the ambit in the particular case before the Court, one has to bear in mind certain points. Firstly, the policy is on a printed form whereas in the proposal the passenger risk is excluded in writing. Secondly, in the policy, which accepted the proposal without purporting to make any variation from it, the proposal being made the basis of the contract and incorporated as it stood, the description of the ambit of the insurance is also in writing, viz.: in the phrase "Warranted used only for general haulage and other trades." Thirdly, if the description of the risk gathered from the proposal and that warranty in the policy is clear, it follows that that dominant provision of the bargain must prevail, unless the words which it is argued extend the ambit are clear beyond all doubt.

As to the suggestion that in the policy proviso (*c*) of clause 1 of Section II. does so extend it. Firstly, I say unless it does so clearly it cannot have the effect of extending the risk. Secondly, I think the difference of opinion between my learned brethren shows that there is a prima facie appearance of its not being very clear. On the view of Greer L.J. that the critical words include contracts of employment with other employers, I venture, respectfully, to repeat the comments which I made in construing the Act, and, secondly—to add the further comment that it is very difficult to presume an intention by the insured to enter into a contract essentially different from his proposal.

If those views are right, it remains to consider for a moment MacKinnon J.'s judgment, because there are two or three criticisms I should like to make upon it. He says (1): "If

(1) Ante, p. 313.

clause (*c*) of the proviso ' carried by reason of or in pursuance of a contract of employment ' means a contract of employment with the insured, it is difficult to see why it would not be merely repeating the words in clause (*b*) of the proviso, ' any person in the employment of the insured.' " I cannot help feeling that the learned judge had not in mind cases like *Hewitson's* case (1), because I think that they are the answer, as Slesser L.J. has said, to that particular difficulty which the learned judge felt. He goes on (2) : " I see no reason for adding the three words ' with the insured ' after the words ' contract of employment ' in clause (ii.) of the proviso in the Act, or in clause (*c*) of the proviso in the policy." The reasons Slesser L.J. has given are in my view sufficient to answer the learned judge's difficulty. Later he uses language which I find a little difficult to follow. He says (3) : " But the insured himself and the company were both subject to the obligations of s. 36 of the Road Traffic Act, 1930, and notwithstanding that warranty or undertaking by the insured that his vehicle would not be used for carrying passengers, it is clear that the company has to, and does by the policy, Section II., ' Liability to Third Parties,' undertake that it will indemnify him against liability for the death or injury of any person who is in fact a passenger being carried in pursuance of a contract of employment." I do not follow that language. It seems to me, as I suggested in the course of the argument, that there the learned judge is saying, in effect, that that term is implied in the contract as an undertaking which the company agreed to give. I think that that is begging the question.

My conclusion is that in this particular case, on the facts found by the learned arbitrator, the award and the judgment of MacKinnon J. were both wrong, because they disregarded what I call the dominant term of the policy, that it was not to cover the passenger risk except just so far as in Section II. of the policy an insurance against liability to passengers is stipulated for, in certain circumstances, in quite clear terms. On the facts of the case, in my view the death of Izzard by the

(1) [1924] A. C. 59.

(2) Ante, p. 314.

(3) Ante, p. 315.

negligence of the driver of the insured's vehicle was not brought within any clear provision saying that he, a passenger, was a person liability to whom was covered by the policy.

For these reasons, I think the appeal ought to be allowed.

GREER L.J. I should like to add a few words about *Hewitson's* case (1), which I had intended to say but forgot to do so. I am not saying it because my brethren were relying upon that case. It is what I had intended to say if I had not been a little hurried in giving my judgment.

Hewitson's case (1) was a case in which the workman was being carried by a railway company, and he brought his claim for workmen's compensation against his own employer, which had nothing whatever to do with his claim against the railway company. It was then seen that he had no claim against the railway company, the carriers, because he had agreed to the terms that they should not be responsible. I cannot help thinking that if he had not so agreed he would have had a claim against the railway company, the carriers; and I think in the present case Izzard was in the same position as Hewitson would have been in if he had not agreed that the railway company should not be responsible for any accident. He had no claim against the employers, but he had a claim, and his widow had a claim, against the carrier. The carrier in this case was Druce, who was in the same position as the railway company would have been in but for the agreement in *Hewitson's* case. (1) I cannot help thinking that cases like *Hewitson's* case (1) were well known to those who dealt with insurance matters, and that sub-para. (*c*) of Section II. of the policy was put in in order to cover the case of a claim against the carrier by a person in the position of Izzard, if he had such a claim against a third party.

That is what I intended to say in regard to *Hewitson's* case (1), and I desire that it shall be considered as being part of my judgment. It is a matter of very little

(1) [1924] A. C. 59.

C. A.
1936

IZZARD
v.
UNIVERSAL
INSURANCE
CO.

consequence, inasmuch as my brethren take a different view on the whole case.

Appeal allowed.
Leave granted to appeal to House of Lords.

Solicitors for appellants: *A. D. Vandamm & Co.*
Solicitors for respondent: *L. Bingham & Co.*

R. F. S.

1936
April 22, 23.

COUNTESS OF SHREWSBURY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Super-tax—Jointure rentcharge payable "clear of all deductions whatsoever for taxes"—Assessment of super-tax and sur-tax—Whether on net rentcharge or on net rentcharge plus income tax thereon—Shrewsbury Estate Act, 1843 (6 & 7 *Vict. c.* 28 (*private*)), *ss.* 7, 9, 10—*Shrewsbury Estate Act,* 1862 (25 & 26 *Vict. c.* 5 (*private*)), *s.* 3.

By a deed, which was made under and followed the terms of a private Act for the settlement of estates, a lady was granted a jointure of 3000*l.* a year charged upon the settled estates and "clear of all deductions whatsoever for taxes or otherwise." It was held by the Court of Appeal that on the true construction of these words of the Act and deed the jointure was granted free of income tax other than super-tax, and it was accordingly paid to the lady without deduction of the income tax thereon, which was paid by the trustees of the settled estates:—

Held, that, inasmuch as the lady received the jointure without deduction of income tax, she in effect received a sum equal to the jointure together with the income tax thereon, and that she should be assessed to super-tax and sur-tax not on the jointure only but upon a sum made up of both the jointure and the income tax thereon.

In re Shrewsbury Estate Acts. Shrewsbury v. *Shrewsbury* [1924] 1 Ch. 315 explained and held applicable.

North British Ry. Co. v. *Scott* [1923] A. C. 37; 8 Tax Cas. 332; and *Brooke* v. *Price* [1917] A. C. 115, applied.

Neumann v. *Commissioners of Inland Revenue* [1933] 1 K. B. 728; [1934] A. C. 215; 18 Tax Cas. 332 explained and distinguished.

CASE stated by the Special Commissioners of Inland Revenue.

The Shrewsbury Estate Act, 1843, provides for vesting part of the settled estates of the then Earl of Shrewsbury in trustees to be sold and for the purchase of other hereditaments to be settled to the same uses and subject to the same restrictions and for other purposes.

Sect. 7 provides that it shall be lawful for the persons and person to whom the hereditaments are limited successively as and when they shall respectively be in the actual possession or entitled to the receipt of the rents issues and profits of the hereditaments by any deed or deeds or instrument or instruments with or without power of revocation but subject and without prejudice to any rentcharge or rentcharges which may have been previously limited under this power or under the power thereinafter contained for charging with annual sums for the benefit of daughters and younger sons, and also subject to any lease or leases as therein specified "to grant, limit and appoint unto and to the use of any woman or women with whom they respectively may marry or may have married for the life or lives of any such woman or women respectively, and for her or their jointure or jointures, any annual sum or yearly rentcharge or annual sums or yearly rentcharges not exceeding in the whole for any one such woman the yearly sum of 3000*l.*, clear of all deductions whatsoever for taxes or otherwise, to be issuing out of and charged or chargeable upon all or any part of the . . . . hereditaments . . . . and to be paid and payable by equal half-yearly payments," and that every such jointure shall respectively be in full satisfaction of the dower at common law which the woman might otherwise have out of the hereditaments.

Sect. 9 provides that when the estates are subject to more than the yearly sum of 5000*l.* in respect of jointures to three or more jointresses they shall not be subject to the actual payment of any greater sum for the second jointure than such a yearly sum as together with the first jointure shall make up 5000*l.* or if the jointures subsequent to the second jointure do not amount to 1000*l.* then as together with the other jointures shall make up 6000*l.*; and the excess of the second jointure above the yearly sum to which the same is hereby limited shall sink for the benefit of the owner in possession.

Sect. 10 provides that the estates shall not at the same time be subject to actual payment of more than 6000*l.* in respect of jointures, so that if apart from this proviso they would be subject to the actual payment of more than 6000*l.* for jointures the annual sum by the charge whereof that excess shall have been occasioned, or the part thereof forming that excess, shall sink for the benefit of the owner in possession, and that the said jointures, subject to the provision in s. 9 for the sinking of the second jointure, shall respectively have preference or priority of payment according to their order of date.

The Shrewsbury Estate Act, 1862, s. 3, empowers any Earl of Shrewsbury to jointure the wife of his heir apparent to any extent not exceeding 1000*l.* a year provided that the limit of 6000*l.* fixed by the earlier Act be not extended.

Under the latter Act the Earl granted a jointure to the wife of his son and heir who predeceased him.

By a jointure deed dated July 20, 1910, and made in pursuance of these Acts, the then Earl of Shrewsbury granted to his wife Ellen Mary Countess of Shrewsbury, hereinafter called "the appellant," for her jointure two yearly rent charges of 1500*l.* each, amounting together to 3000*l.*, "clear of all deductions whatsoever for taxes or otherwise," the former rentcharge to be paid from and after the decease of the Earl, and the latter rentcharge to be paid from and after the decease of the survivor of the Earl and his mother.

The Earl's mother died on July 29, 1912.

The Earl died on May 17, 1921, whereupon his grandson succeeded him.

The total jointures were under 6000*l.*

On October 24, 1923, it was ordered by the Court of Appeal that on the true construction of the above Acts and deed the "said two jointure rentcharges of 1500*l.* each are respectively payable free of income tax (other than super-tax)": see *In re Shrewsbury Estate Acts. Shrewsbury* v. *Shrewsbury*. (1)

For the years 1928-29; 1929-30; 1930-31; 1931-32; 1932-33; and 1933-34 the appellant had been assessed by the Commissioners of Inland Revenue, hereinafter called "the respondents," to super-tax and sur-tax in respect of her jointure rentcharge without addition thereto for income tax, that is to say in respect of a sum of 3000*l.* per annum.

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(1) [1924] 1 Ch. 315.

The respondents made additional assessments to super-tax and sur-tax upon the appellant for these years in order to bring into assessment amounts equivalent to the income tax which would have been deductible if the rentcharges had been of such amounts as after deduction of income tax would have resulted in payments of 1500*l.* each. These additional assessments were as follows:—

for 1928/9	..	Super-tax	..	750*l.*
,, 1928/9	..	Sur-tax	..	750*l.*
,, 1929/30	..	Sur-tax	..	750*l.*
,, 1930/1	..	Sur-tax	..	871*l.*
,, 1931/2	..	Sur-tax	..	1000*l.*
,, 1932/3	..	Sur-tax	..	1000*l.*
,, 1933/4	..	Sur-tax	..	1000*l.*

The appellant appealed to the Special Commissioners against these additional assessments.

On July 8, 1935, the appeal was heard by the Special Commissioners.

It was contended on behalf of the appellant: (*a*) that the rentcharges were not net sums after deduction of income tax; (*b*) that nothing could be added for income tax; and (*c*) that the assessments should be discharged.

It was contended on behalf of the respondents: (*a*) that on the true construction of the Acts and deed, the total of the two jointure rentcharges, namely 3000*l.*, was a net sum after deduction of income tax; (*b*) that the appellant was properly assessable to super-tax and sur-tax in the appropriate amounts of income tax attributable to the two jointure rentcharges totalling 3000*l.* for each of the years in question; and (*c*) that the additional assessments were correctly made and should be confirmed.

The Special Commissioners held that the words "clear of all deductions whatsoever for taxes" should be construed as meaning that the rentcharges were granted "free of income tax," and that for super-tax and sur-tax purposes income tax had to be added to the rentcharges in calculating the appellant's liability; and they accordingly disallowed the appeal.

J. Millard Tucker K.C. and *Cyril King* for the appellant. The additional assessments to super-tax and sur-tax made upon the appellant in respect of the amount of the income tax upon her jointure rentcharges were improperly made and should be discharged. Apart from authority, the provision in s. 7 of the Act of 1843, and in the deed of 1910, under which the appellant's jointure rentcharges are granted, that they are granted "clear of all deductions for taxes or otherwise" on its true construction means that they are granted clear of all taxes whatsoever, and therefore clear not only of income tax, but also of super-tax and sur-tax. It is true that in the case of *In re Shrewsbury Estate Acts. Shrewsbury* v. *Shrewsbury* (1), which dealt with the construction of these very provisions, the order of the Court of Appeal was that these jointure rentcharges are payable "free of income tax other than super-tax," but it would seem that that order does not correctly represent the decision of the Court. There is a passage in the judgment of Sargant L.J. which implies that the appellant received an annuity of 3000*l.* only and not an annuity of that amount plus income tax. Here the trustees of the deed did not deduct income tax from the amount of the jointure rentcharges of 3000*l.* granted to the appellant and her liability for super-tax and sur-tax cannot extend beyond the amount which she actually received: *Neumann* v. *Commissioners of Inland Revenue.* (2)

Sir Donald Somervell A.-G. and *R. P. Hills* for the Commissioners of Inland Revenue.

The additional assessments to super-tax and sur-tax upon the appellant were properly made and should be confirmed. The appellant's jointure rentcharges of 3000*l.*, having been granted to her under s. 7 of the Shrewsbury Estates Act, 1843, and by the deed of 1910, were granted to her "clear of all deductions whatsoever for taxes or otherwise," she in effect received not only rentcharges of that specified amount, but rentcharges of that amount plus the amount of the income tax thereon, and she is therefore assessable to super-tax and sur-tax not only on the amount of the rentcharges, but also on the amount of the income tax thereon. The decision of the Court of Appeal in *In re Shrewsbury Estate Acts. Shrewsbury* v. *Shrewsbury* (1) that the jointures were granted to the appellant free of income tax other than super-tax is plainly a decision that they were granted free of income tax but not of super-tax, and this Court is bound by that decision to hold that the appellant is liable to the super-tax and sur-tax to which she has been assessed. There is no ground for the view that the formal order of the Court in that case is inconsistent with the reasons given by Sargant L.J. or any other member of the Court. The case of *Neumann* v. *Commissioners of Inland Revenue* (2) is distinguishable from the present case, and does not support the contention that the appellant is only liable for super-tax on the amount actually received by her from the trustees. The decision of the special commissioners in the present case is supported by *North British Ry. Co.* v. *Scott.* (3) The grant of the jointures clear of all " deductions " for taxes excludes a tax such as income tax which is imposed by way of deduction, but not taxes such as super-tax and sur-tax which are not imposed by way of deduction.

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(1) [1924] 1 Ch. 315.

(2) [1933] 1 K. B. 728; [1934] A. C. 215; 18 Tax Cas. 332.

Tucker K.C. in reply.

The grantor of the jointures might have granted them subject to deduction of income tax, and the fact that he has not done so, while it leaves the appellant entitled to the full amount of the rentcharges, cannot increase that amount beyond the figure specified.

LAWRENCE J. In spite of the very able arguments addressed to me by the learned counsel on behalf of the appellant, I think that the appeal must be dismissed and that the decision of the commissioners ought to be affirmed.

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(1) [1924] 1 Ch. 315.
(2) [1933] 1 K.B. 728; [1934] A. C. 215; 18 Tax Cas. 332.
(3) [1923] A. C. 37.

The question is whether two jointures which were granted to the Countess of Shrewsbury, the appellant, under a private Act of 1843 are to be brought in for super-tax and sur-tax at the sum of 3000*l.* or at the sum of 3000*l.* with income tax added thereto. The answer to that question depends upon the construction of the Act of 1843 and upon the relevant decisions, particularly the decision of the Court of Appeal on the construction of this very Statute in the case of *In re Shrewsbury Estate Acts. Shrewsbury* v. *Shrewsbury.* (1)

The section of the Act of 1843 which has to be construed is s. 7, which so far as material gives a power of jointure to the extent of 3000*l.* per annum to the person in possession of the estates and the power is "to grant limit and appoint unto and to the use of any woman or women with whom they respectively may marry or may have married . . . . for her or their jointure or jointures, any annual sum . . . . not exceeding in the whole for any one such woman the yearly sum of three thousand pounds, clear of all deductions whatsoever for taxes or otherwise." Those last words are the words which I have to construe: "the yearly sum of three thousand pounds, clear of all deductions whatsoever for taxes or otherwise."

Two other sections in the Act have been referred to, namely, s. 9, which imposes a limit of 5000*l.* or 6000*l.* as the case may be upon the power to jointure, and s. 10, which imposes a limit of 6000*l.*; and the later private Act of 1862, which was passed for similar purposes does not extend that limit. By deed the late Earl of Shrewsbury exercised that power in terms of the Statute, granting two annuities of 1500*l.* each to the appellant, and using the words of s. 7 of the Act of 1843, namely "clear of all deductions whatsoever for taxes or otherwise."

In 1924 the matter was brought before the Court by the trustees of the Shrewsbury Estates and Lady Shrewsbury by way of originating summons to have it determined whether the annuities granted by the deed to which I have referred were to be free of income tax and super-tax, as was contended in the Court below, and free of income tax, as was contended in the Court of Appeal. The Court of Appeal held that the annuities were granted "free of income tax other than super-tax" and the first point that was made on behalf of the Crown in this case is that I am bound by this judgment of the Court of Appeal, which it is contended is a judgment that these jointures were granted free of income tax but not of super-tax. It is admitted on behalf of the appellant that if that was the judgment of the Court of Appeal and if those words, "free of income tax other than super-tax" are to be read in the sense which has been attributed to them by the Courts, then I must decide the case as the special commissioners have decided it and dismiss the appeal. But it is contended by counsel on behalf of the appellant that when the case in the Court of Appeal is looked at and the reasons of the learned Lords Justices are considered, the formal Order so read does not accord with these reasons. If I thought that that was so I should not hold myself bound by the words of the formal Order, because in my view a Court is bound by the principle of the decision of another Court of superior or co-ordinate jurisdiction and not by the words of the formal judgment; but I do not take that view of the reasoning of the learned Lords Justices. Great reliance was placed upon the observations of Sargant L.J. in that case (1) where he was negativing an argument based upon the provisions of ss. 9 and 10 that the amount of the annuity granted by s. 7 could not be taken to be a sum larger than 3000*l.*, because otherwise it might bring the figures of the jointures empowered to be granted above the limit imposed by ss. 9 and 10. That argument had been dealt with by both the Master of the Rolls and Warrington L.J. in the sense that they had said that the limit imposed by ss. 9 and 10 ought to be read in the same sense as the limit of 3000*l.* imposed by s. 7, and that there was therefore, no force in the argument. But Sargant L.J. said: "then comes the particular argument as to cls. 9 and 10. That argument really depends on two suggestions. The first suggestion is that the limits of total charging of the jointures spoken of do not apply to jointures of the same special character as the jointures mentioned in s. 7, and the second

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(1) [1924] 1 Ch. 315.

(1) [1924] 1 Ch. 315, 341.

suggestion is that the creation of the jointure in cl. 7 is the creation of two charges, the first of 3000*l.* itself, and the second the amount charged necessary to defray the income tax. In my judgment neither suggestion is sound. What is authorised by s. 7 is the creation of a specially favourable annuity—namely, one that is exempt from the liability to have income tax deducted by the tenant for life when he comes to pay the charge, and on all ordinary principles of construction the super-added ss. 9 and 10 are dealing with annuities of the same character as those created under s. 7—namely, annuities with this special exemption." (1) It is submitted that in that passage Sargant L.J. was saying that this was a specially favourable annuity which enjoyed a statutory freedom from deduction of tax by the trustees, and that in those circumstances it must be treated as an annuity of the amount stated—namely, 3000*l.* and that the annuitant cannot be treated as receiving anything more than that 3000*l.* and therefore cannot be treated as receiving the amount of the tax which has actually been paid by the trustees. But if one reads a sentence in the judgment of Sargant L.J. which precedes that passage, it would appear that that cannot have been the intention of the words which he uses in that passage for that preceding sentence is "There is nothing in the Act of 1842 (2) to prevent the division of a total income between several beneficiaries in such a way that the person receiving fixed income may have the benefit of receiving it as so absolutely fixed and invariable as to have his income tax provided for out of the total income." (3) When one finds such a sentence as that preceding the other passage in his judgment, when one finds nothing in the judgments of the other members of the Court which suggests any such view as is expressed by Sargant L.J. in the passage I have read, and when one finds that the operative order of the Court is framed as it is in that case, namely, that the jointures and rentcharges are respectively payable free of income tax, it seems to me impossible to read the judgment in any way except as a judgment that the effect of the Act of 1843 was to grant these jointures free of

(1) [1924] 1 Ch. 315, 341.
(2) The Income Tax Act, 1842 (5 & 6 Vict. c. 35) (repd.).
(3) [1924] 1 Ch. 315, 340.

income tax in the sense that the annuitant must be taken for the purposes of super-tax to have received the amount of the annuity and the amount of the tax thereon which had been discharged by the trustees.

I therefore think that I am constrained by that judgment to hold that the amount which ought to be brought in for super-tax and sur-tax purposes in this case is 3000*l.* and the tax thereon. But in deference to the arguments which have been addressed to me, I think perhaps that I ought to deal with them in more detail.

As I understand the arguments, they were these. It was said in the first place: Annuities are sometimes granted free from income tax, and in other cases an annuity is granted in such words as these: "Such sum as after deduction of tax leaves a sum" of a certain amount; and it was agreed by counsel for the appellants that in those cases the annuitant must be taken to receive for tax purposes the amount of the annuity and the amount of the tax. Then it was said there is a third class of cases; where an annuity is granted, and the payer of the annuity does not in fact exercise his right of deduction. He has the right of deduction and he cannot by agreement dispose of it, though he may not exercise it, and my attention was called to the case of *Neumann* v. *The Commissioners of Inland Revenue.* (1) It is said that that was a case which illustrates this third category of annuities. In that case a company, the Salisbury House Estate, Ld., had been taxed upon its property in land under Schedule A, but the land in question had been let at a considerably higher sum than the amount assessed under Schedule A, and litigation was going on between the Revenue and the company as to the taxability of the company upon this extra sum—the difference between the actual amount of the rents and the amount assessed under Schedule A. The company accordingly placed the sum to reserve pending litigation, and when the litigation was decided in favour of the company the company declared a dividend out of this sum—absorbing this sum which had been placed to reserve,

(1) [1933] 1 K. B. 728; [1934] A. C. 215; 18 Tax Cas. 332.

and the question there was whether these dividends were liable to sur-tax in the hands of their recipients. It was held in the House of Lords that those sums were paid out of profits which had been charged and that they were liable to sur-tax, but that they were only liable to sur-tax on the actual amount received by the recipient of the dividend and not, as was contended on the other side, upon the amount received by the recipient plus what was said to be the appropriate amount of tax upon that sum. It is said here that that case is applicable to the present case. There the company when it paid its dividend did not in fact deduct any tax, and it is said that the House of Lords decided that in such circumstances the sur-tax liability of the recipient was only for the amount actually received; and so here, it is argued, because the trustees have not deducted income tax, and as a matter of fact could not, the liability for super-tax and sur-tax on the appellant is only for the amount which she actually receives. In my judgment that case is not really applicable to the present case. The facts of it were extremely special. It was decided upon different rules and different Acts and with reference to dividends, and one of the principal grounds for the decision appears to have been that in the particular circumstances of that case the gross sum from which the income tax was deducted had never in fact existed. Lord Tomlin puts that ground very clearly. Owing to the particular facts of that case, income tax under Schedule A having been deducted a reserve fund had been accumulated and was distributed in toto, and as Lord Tomlin said, "it would be repellant to most minds that the appellant should be charged as a part of his income with a sum which not only has never come to him, but has never existed in fact. It is plain that the respondents' cross-appeal, which seeks to treat the sum of 4275*l.* as a net sum, corresponding to a gross sum of 5343*l.* 15*s.*, assumes that the amount divisible by the Company was something in excess of anything they ever had to divide." (1) The sum of 4275*l.* was the sum that the shareholder had received as dividend. The facts of this case are quite different, because it must be assumed upon the facts which are stated in the special case that the trustees have paid income tax pound for pound upon the amount paid upon this annuity. I therefore hold that *Neumann's Case* (1) does not establish the third category of annuities which counsel for the appellant contend for.

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(1) [1934] A. C. 215, 230; 18 Tax Cas. 332, 364.

I think the case of *The North British Ry. Co.* v. *Scott* (2) is an authority which is more closely appropriate to this case, although that again was a case which was decided upon a different Schedule. That was a case in which the railway company had agreed with their employees not to deduct from their salaries the income tax which by a special provision of the Income Tax Acts has to be paid by railway companies, and it was held both by the Courts in Scotland and by the House of Lords that the effect of that contract was that the income of the employee was the salary plus the amount of the tax. In that case, there being a competent agreement binding the railway company not to deduct income tax from the salaries of its employees, it was held that for the purposes of income tax the employees had received the salary plus the tax. Similarly, in the present case, there being by the Act of 1843, an obligation imposed upon the Earl of Shrewsbury and the trustees of the settlement not to deduct income tax from the jointure annuities, I am of opinion that the recipient of the annuity must be taken to have received the annuity plus the amount of the income tax thereon.

Counsel for the appellant in his reply submitted that the true analogy with the present case was a case where the payer of an annuity agreed to pay a sum, say 500*l.*, simpliciter, and, although he had the power to deduct income tax from that sum, did not do so, and he argued that in such circumstances in any event if he had meant to deduct the tax it would have reduced the amount which the annuitant received to 400*l.* or some such sum, and that where he did not in fact exercise his power it could not increase the annuity beyond the sum of 500*l.*, which was the full extent of the sum agreed

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(1) [1933] 1 K. B. 728; [1934] A. C. 215; 18 Tax Cas. 332.

(2) [1923] A. C. 37; 8 Tax Cas. 332.

1936

Shrewsbury (Countess) *v.* Inland Revenue Commissioners.

Lawrence J.

to be granted. In my judgment that case is not a true analogy with the present case.

I have to consider, apart from the judgment of the Court of Appeal, which I hold is binding upon me, the words of the Act of 1843, and I am unable to draw any distinction between the words "clear of all deductions whatsoever for taxes or otherwise," and the words, "free of all deductions for income tax or otherwise." It is true, of course, that if the words had been "free of tax," they would then have been read as including super-tax, and the super-tax would have had to be paid by the trustees. The only reason why they are not so read here is because the word "deduction" is included, and super-tax is not imposed by way of deduction. That is an accident which is due, no doubt, or partly due, to the fact that this Act of 1843 was passed long before super-tax was ever thought of, and just after the Income Tax Act, 1842, had been passed which did impose income tax by way of deduction upon annuities. But the phrase, "clear of all deductions" seems to me to have the same meaning as "free of all deductions," and I am unable to see that the introduction of the word "deduction" ought to have the effect contended for by the appellants. I think that the case of *Brooke* v. *Price* (1), which uses the words "clear without deducting," indicates that the reference to deduction does not have the effect contended for by the appellants.

The object of this Act of 1843 was, I think, simply to give power to the Earl of Shrewsbury and his trustees to grant annuities with a certain limit, and it had no other reference to income tax or super-tax. I am, therefore, of opinion that the words, "clear of all deductions whatsoever for taxes or otherwise," do not prevent the proper sum which has to be brought in for the purpose of super-tax and sur-tax being the amount of the annuity plus the amount of the income tax thereon. The appeal will therefore be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Nicholson, Freeland & Shepherd.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. R.

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(1) [1917] A. C. 115.

GASKELL & CHAMBERS, LIMITED *v.* HUDSON, DODSWORTH AND COMPANY.

1936
March 9, 18;
May 7.

THE KING *v.* HUDSON.
Ex parte GASKELL & CHAMBERS, LIMITED.

Contempt of Court—Publication of statement of claim and comments pending trial of action—Act of agent of defendants without their knowledge or consent—Applications for writs of attachment against defendants and agent dismissed.

The plaintiffs were manufacturers of apparatus for conveying beer from cellar to bar in hotels and public-houses, and the defendants were competing manufacturers of different apparatus for the same purpose. The plaintiffs brought an action against the defendants alleging that the defendants had caused to be published to brewers letters disparaging the plaintiffs' said apparatus, and that the plaintiffs had thereby been prejudiced in their business, and claiming damages and an injunction. A circular letter, purporting to be issued by the defendants, was thereupon published to certain brewers which enclosed a copy of the plaintiffs' statement of claim, and contained further adverse references to apparatus of the kind manufactured by the plaintiffs, and a statement that the defendants intended "to contest this 'cock and bull' claim to the uttermost degree." It appeared that the circular letter and the enclosed copies of the statement of claim had been sent out by the publicity agent of the defendants without their knowledge. On behalf of the plaintiffs a motion was made in the action for a writ of attachment against the defendants for contempt of Court in publishing the statement of claim and the covering circular letter, and an order nisi was obtained for a similar writ against the publicity agent for circulating these documents, on the ground that his doing so was calculated to prejudice the fair trial of the action. The agent stated that in doing what he had done he had no intention of prejudicing the fair trial of the action, and that if he had acted improperly he made his apologies to the Court:—

Held, that the motion against the defendants should be dismissed, and that in the circumstances the order nisi against the publicity agent should also be discharged.

Reg. v. *Payne and Cooper* [1896] 1 Q. B. 577, observations adopted.

Perry's Case, cited in *"The St. James's Evening Post" and "Champion" Case*: *Roach* v. *Garvan* (1742) 2 Atk. 469; Dick. 794; *Bowden* v. *Russell* (1877) 46 L.J. (Ch.) 414; and *In re The William Thomas Shipping Co.* [1930] 2 Ch. 368, referred to.

1936

GASKELL & CHAMBERS, LD., *Ex parte.*

MOTION for a writ of attachment for contempt of Court against the defendants in the action.

Order nisi for a writ of attachment for contempt of Court against an agent of the defendants.

The plaintiffs, Gaskell & Chambers, Ld., were at all material times manufacturers and sellers of fittings for hotels and public bars, and in particular of apparatus for conveying beer from cellar to bar, which was known as the telescopic system.

The defendants, Hudson, Dodsworth & Co., were also manufacturers and sellers of apparatus for the conveyance of beer from cellar to bar. The only partners in that firm were Mrs. Gertrude May Hudson and Mrs. Beatrice Annie Dodsworth.

On December 2, 1935, the plaintiffs brought the present action against the defendants; and on January 29, 1936, the plaintiffs delivered their statement of claim, in which they alleged that the defendants had falsely and maliciously caused to be published to brewers two circular letters, in June and August, 1935, respectively, containing statements disparaging the plaintiffs' said apparatus as being obsolete and anti-hygienic; that the plaintiffs denied these statements, and said that they had thereby been prejudiced in their business; and that they claimed damages and an injunction. A copy of the statement of claim was duly delivered to the defendants.

A circular letter dated February 24, 1936, purporting to be issued by the defendants, was published to certain brewers, which contained, among other statements, the following: "Since the commencement of this business our sales have shown considerable increases week by week, and this unbounded success seems to have aroused the rabid jealousy of Messrs. Gaskell & Chambers, Ld., as shown by the enclosed 'statement of claim' which we have received from them. Please keep the enclosed copy for reference. Our reason for bringing this to your notice is because Messrs. Gaskell & Chambers, Ld., commenced a similar action against us on July 18th last, which they wholly discontinued on November 30th, and we refuse to be intimidated by these actions, and we intend to contest this 'cock and bull' claim to the uttermost

1936

GASKELL & CHAMBERS, LD., *Ex parte.*

degree." A printed copy of the statement of claim was enclosed with each copy of the letter.

Another circular letter of the same date, also purporting to be issued by the defendants, was published to licensees in Scotland, which it was said also commented on matters in dispute in the action.

The plaintiffs gave notice of motion dated February 28, 1936, for a writ of attachment against the defendants for contempt of Court in publishing these circular letters and the statement of claim in the action.

On March 9, 1936, the motion came on for hearing. An affidavit of the defendant Mrs. Hudson was then read in which she stated that she had no knowledge of the publication of the documents referred to in the notice of motion until after their publication; that she was never consulted as to their publication; that all that work was done by her husband; and that her partner Mrs. Dodsworth had for a long time been very ill and unable to attend to business. An affidavit of Mr. Fred Hudson, the husband of the defendant, Mrs. Hudson, was also read in which he said that he was the principal traveller and publicity agent of the defendants; that he sent out the documents referred to in the notice of motion; that it was to counteract a previous circular of the plaintiffs that he did so, and that in doing so he acted upon his own authority and initiative, and without consulting the defendants; that he had no idea that his action in sending out the circulars could constitute a contempt; that he had no intention of prejudicing the fair trial of the action; and that if he had acted improperly he expressed his regret and made his humblest apologies to the Court.

The Court adjourned the hearing of the motion.

On March 18, 1936, an order nisi was granted for a writ of attachment against Mr. Fred Hudson for his contempt in circulating or causing to be circulated copies of the statement of claim, as well as in commenting upon the matter in dispute between the parties in a manner calculated to prejudice the fair trial of the action.

On May 7, 1936, the adjourned motion and the order nisi came on together for hearing.

Croom-Johnson K.C. and *P. Vos* for the plaintiffs. The motion for a writ of attachment against the defendants for contempt of Court should be granted, and the order nisi for a similar writ against F. Hudson should be made absolute. These parties have all, pending the trial of the action, published the plaintiffs' statement of claim therein and the circular letter dated June 17, 1935, making comments thereon. Each of these acts committed by any of these parties constitutes a contempt of Court. The publication of the statement of claim to the persons to whom it was published, whether by the defendants or by F. Hudson, was a contempt. The only persons to whom the documents relating to a pending action may properly be published are the other parties to the action and, perhaps, in certain circumstances, persons having an interest in the subject-matter of the action, such as members of the family of a party, or persons in confidential relations to a party. The publication of such documents, even without comment, to any other person is a contempt of Court: see Oswald on Contempt of Court (3rd ed.), p. 95. Thus, it has been held to be a contempt for a plaintiff to send copies of his statement of claim to third parties before the hearing of the action: *Bowden* v. *Russell* (1); and for a party to an action to print and publish his own brief to counsel before the hearing: *Perry's Case.* (2) Though there appears to be no decided case in which a party to an action has been committed for contempt for doing what has been done in the present case, namely publishing the pleading against himself of the opposite party to the action, yet it is submitted that there is no difference in principle between that case and the case in which a party publishes his own pleading. In this case the publication of the statement of claim in which the names of certain persons are mentioned must tend to interfere with the trial of the action by preventing these persons from coming forward as witnesses for the plaintiffs. Even if the publication by one party of the pleading of another party against himself may not be a contempt, it was still a contempt for F. Hudson, who is no party to this action, to publish the statement of claim. The publication by the defendants and F. Hudson pending the trial of the action of the circular letter of February 24, 1936, representing the plaintiffs as being actuated by jealousy and describing their action as a "cock and bull" claim, and the enclosure in that letter of the defendants' two previous circular letters of June and August, 1935, as set out in the statement of claim, is a serious contempt of Court, inasmuch as it tends to interfere with the fair trial of the action by repeating the statements regarding the apparatus manufactured by the plaintiffs which constitute the plaintiffs' cause of action, by casting abuse upon the plaintiffs, by prejudicing the public against them, by deterring the persons mentioned in these letters or to whom they were sent from becoming witnesses for the plaintiffs, and by discouraging other persons having good causes of action from coming to the Court for relief: see *"The St. James's Evening Post" and "Champion" Case: Roach* v. *Garvan* (1) and *In re The William Thomas Shipping Co., Ld.* (2) No letters previously published by the plaintiffs to their customers afforded any excuse for the publication of these letters of the defendants. The plaintiffs could not have applied to the Court in time to prevent the publication of these documents by injunction; and the only course open to them was to make these applications for attachment. Though F. Hudson may be one of the persons who really carry on the business of the defendants, he must be treated for the purposes of these applications not as a party to the action but as a third party. Though the defendants do not conduct the business which is carried on under their names, they ought not entirely to escape liability for the acts of F. Hudson their agent, and they should at least be ordered to pay the costs of the application against them.

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(1) 46 L. J. (Ch.) 414.

(2) Cited in "*The St. James's Evening Post*" *and* "*Champion*" *Case: Roach* v. *Garvan,* 2 Atk. 469, 471; S. C. Dick. 794.

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(1) 2 Atk. 469; Dick. 794.

(2) [1930] 2 Ch. 368.

1936

GASKELL & CHAMBERS, LD., *Ex parte.*

Fox-Andrews and *Gerald Gardiner*, for the defendants and F. Hudson, were not called upon to argue.

LORD HEWART C.J. This is a motion for attachment and an order nisi for attachment for contempt of Court which consisted in the circulation by or on behalf of the defendants in an action of the statement of claim in that action together with certain comments upon it. The action has been called an action for libel; it is really an action for slander of goods in which if the plaintiffs are to succeed they will have to prove special damage. I refrain most deliberately from making any remarks upon the merits of those pending proceedings. We are not concerned with them, and the question whether they are good, bad or indifferent is wholly irrelevant. The question here is whether upon this motion or upon this order nisi anybody should be committed for contempt. So far as the motion is concerned cadit quaestio. It is now apparent that the two persons against whom the motion was directed were in this matter innocent. They were married women who gave their names to a certain business firm, but apart from that they knew nothing. With regard to the order nisi, that is directed against the man Hudson, who apparently was acting as agent in the business. The argument which was presented to us is that in every case, when an action is pending, it must be a contempt of Court to circulate a pleading, even the pleading of one's own opponent, with comment, for the reason suggested here, that possible witnesses may be deterred from doing what otherwise they would have done. Our attention has been directed to various reported cases. In my opinion there is no case which goes near to establishing the proposition contended for on behalf of the applicants. It seems to me to be idle to speak of general rules in a context in which each case must be considered upon its own merits. When I look at the course of controversy between the parties to this action, it seems to me to be useless to contend that the circulation of the documents which have been distributed here, whatever else its effect may be, amounts to contempt of Court. I should like to refer to the words used forty years ago by Lord Russell C.J., which, with respect, seem to me to be no less true to-day than they were then. He said in the case of *Reg.* v. *Payne and Cooper* (1): "I wish to express the view which I entertain, that applications of this nature have in many cases gone too far. No doubt the power which the Court possesses in such cases is a salutary power, and it ought to be exercised in cases where there is a real contempt, but only where there are serious grounds for its exercise. Every libel on a person about to be tried is not necessarily a contempt of Court; but the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending." (2) Wright J. in the same case said: "I agree with all that the Lord Chief Justice has said, and I only wish to add that, in my opinion, in order to justify an application to the Court the publication complained of must be calculated really to interfere with a fair trial, and, if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the Court. . . . . That is the rule which I wish to adopt with regard to applications of this nature." (3) Whether or not that which has been done here on the part of the defendants or on their behalf or in their supposed interest may be of some use to the plaintiffs in the action if and when it comes on for hearing, I do not know; but I am quite clear that it does not give rise to a case in which there should be a writ of attachment against anybody. I think, therefore, that the motion ought to be refused and that the order nisi ought to be discharged.

DU PARCQ J. I agree. It is, in my opinion also, of great importance that in a case of this kind we should not try to lay down general rules. There are many things which may amount to a contempt of Court. Publication of pleadings in an action may in certain circumstances amount to a contempt of Court; while in other circumstances it may not. Making unfavourable comments upon another party to the action

(1) [1896] 1 Q. B. 577.
(2) Ibid. 580.
(3) Ibid. 581.

may amount to a contempt of Court, though it will not in every case be a contempt of Court. It has also to be borne in mind that, even if it be established in a particular case that something has been done which does amount to a contempt of Court, an application for attachment or committal still ought not to be made unless, as my Lord has said, that contempt is calculated really to interfere with a fair trial. In this case the applications are based upon two facts. First, it is said that a pleading was published. The pleading which was published was the pleading of the other side. It would seem rather absurd in most cases, I will not say in all cases, to say that the fair trial of an action was likely to be prejudiced, because one party to it showed to members of the public what was being said against himself by the other party. In the present case it is not easy to see how the publication of the statement of claim would be likely to prejudice the trial of the action. The other fact relied upon is that the comments complained of were made. I agree, of course, that the action between these parties is not a libel action, but it is in many ways analogous to a libel action. If it were possible to say that in an action of this kind there ought to be a committal for contempt of Court, because the person who was alleged to have slandered the goods of the plaintiff repeated the alleged slander, it would seem to follow that in a libel action a defendant who said that notwithstanding the fact that an action had been brought against him for libel he was going to repeat until the trial what he had already said about the plaintiff, might be and would be committed to prison. Mr. Croom-Johnson, who has made researches in this matter, says, and I am not surprised to hear it, that so far as he knows there is no case where the Court has ever committed for contempt a defendant who has insisted upon taking up that attitude. One knows that there is great difficulty, to put it no higher, even about getting an injunction to restrain a defendant from repeating an alleged libel when he says that he intends to justify it. In those circumstances it seems to me that if we were to accede to these applications we should be going far beyond anything that has previously been done in this Court, and should be violating the principle that this machinery ought not to be set in motion and that an attempt ought not to be made to send anybody to prison unless something has been done which merits imprisonment. I agree entirely with what has been said by my Lord.

GODDARD J. I agree. The jurisdiction sought to be invoked in this case is a jurisdiction which it is very necessary that the Court should possess both for the vindication of its own authority and for the protection of the litigants who may come before it. On the other hand it is a jurisdiction the exercise of which may deprive the subject of his liberty without the intervention of a jury, and in circumstances in which there is no appeal. It is therefore a jurisdiction to be used with circumspection, and only to be invoked for grave and serious reasons and on real and substantial grounds. It certainly ought not to be invoked merely for the purpose of getting costs, which I do not suggest is the purpose in this case. It ought not to be invoked merely for the purpose of satisfying a feeling of vengeance against a person who may have done something which the opposite side in the litigation does not like. In this class of case, where complaint is made of the circulation of a pleading or a comment on a pleading in a civil matter, I agree with my Lord and du Parcq J. that it is undesirable to lay down any general rules, because by doing so the Court might unduly fetter itself in exercising the jurisdiction in cases of this sort. I believe that the cases, somewhat analogous to the present case, upon which Mr. Croom-Johnson sought to rely, can be divided into two classes. There are, for instance, *Perry's Case* (1) and *Bowden* v. *Russell* (2), the case before Malins V.-C., which establish that the Court will not allow its process to be made the vehicle of a libel upon other persons, and that if the litigant uses the process as a means of disseminating a libel, the Court will not put the injured person to the expense and delay of bringing an action to remedy the injury, but will, if asked to do so, interfere in a summary way by treating it as a contempt of Court to use its process as a means of disseminating libels. That is almost a self-evident proposition. The other class of case illustrated by the judgment of Maugham J. in the case of *In re The William Thomas Shipping Co.* (1), to which reference has been made, is a class of case where an attempt has been made to intimidate witnesses in or the parties to an action. The facts of this case seem to be far removed from either of these two cases. If the plaintiffs have a cause of action, what has been done in this case may or may not increase the damages. To say that in this case it is necessary for this Court to interfere by the summary process of attachment, is in my opinion going far beyond what has been done in any case of this sort. I agree that both the motion and the rule should be dismissed.

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(1) Cited in *"The St. James's Evening Post" and "Champion" Case : Roach* v. *Garvan*, 2 Atk. 469, 471 ; S. C. Dick. 794.

(2) 46 L. J. (Ch.) 414.

Motion dismissed.
Order nisi discharged.

Solicitors for applicants: *Hicks, Arnold & Bender, for Glaisyer, Porter & Mason, Birmingham.*

Solicitors for respondents: *J. D. Arthur & Co., for E. A. W. Wragg, Manchester.*

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(1) [1930] 2 Ch. 368, 372.

J. R.

STROOD ESTATES COMPANY, LIMITED *v.* GREGORY.

C. A.
1936
April 29, 30;
May 1, 21.

Considered. WATES *v.* ROWLAND [1952] 1 Q.B. 12

Considered. WATES *v.* ROWLAND [1952] 2 Q.B. 12

Landlord and tenant—Rent restriction—Increase of rent—Landlord responsible for whole of repairs—Rates paid by landlord—Rates compounded—Permitted increases—Percentages of net rent—"Net rent," whether standard rent less compounded rate or less assessed rate—Percentage of sum expended by landlord on improvement—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*a*), (*c*), (*d*), (*e*); *s.* 12, *sub-s.* 1 (*c*).

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:—

Sect. 2: "(1.) The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say:— . . . .

(*c*) In addition to any such amounts as aforesaid, an amount not exceeding fifteen per centum of the net rent: . . . .

(*d*) In further addition to any such amounts as aforesaid—(i.) where the landlord is responsible for the whole of the repairs, an amount not exceeding twenty-five per cent. of the net rent; . . . ."

Sect. 12: "(1.) For the purposes of this Act, except where the context otherwise requires:— . . . .

(*c*) The expression 'net rent' means, where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent":—

Held, on the true construction of these and the other provisions of the Act, that in the first branch of s. 12, sub-s. 1 (*c*), which defines "net rent" for the purposes of the Act where the landlord has paid the rates, the expressions "rates chargeable" and "the amount of such rates" refer to the full amount of the rates which would be assessed upon an occupier, and that in a case where pursuant to the provisions of an Act the landlord pays smaller or compounded rates the "net rent" means the standard rent less, not the compounded rates, but the full rates; and, consequently, that in a case where the landlord paid such smaller or compounded rates, the "net rent" under s. 2, sub-s. 1 (*c*) and (*d*), of which the increases of rent thereby permitted are a percentage, was the standard rent less, not the compounded rates, but the full rates.

Nicholson v. *Jackson* (1921) 37 Times L. R. 887, distinguished, but observation of Lord Cave applied.

Evans v. *Baxter* (1930) 46 Times L. R. 270 and *Hodgkinson* v. *Hewitt* (1928) 139 L. T. 401; 44 Times L. R. 694, distinguished.

Held, further, that the substitution by the landlord at the

C. A.
1936

Strood Estates Co. *v.* Gregory.

dwelling-house of a modern and efficient sanitary system for one of an older type was an improvement or structural alteration within the meaning of s. 2, sub-s. 1 (*a*), of the Act (1), and that in the circumstances the landlord was entitled under that clause to an increase of rent equal to 8 per cent. of the expenditure incurred by him in respect thereof.

Appeal from Rochester County Court.

The Strood Estates Co., Ld. (hereinafter called "the plaintiffs"), let to Frederick Gregory (hereinafter called "the defendant"), a dwelling-house, No. 76 Temple Street, Rochester, on a weekly tenancy. By the terms of the tenancy the plaintiffs were responsible for the whole of the repairs, and they paid the rates chargeable in respect of the house. At all material times the local authority granted the plaintiffs an allowance or abatement in respect of the rates, and the plaintiffs, instead of paying the full amount of the rates assessed, in fact paid only a compounded rate in accordance with the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 4, and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211.

The standard rent of the house on August 3, 1914, was 5*s*. 6*d*. per week.

The plaintiffs had done work in substituting at the house a modern and efficient sanitary system for one of a more antiquated type.

The plaintiffs, as landlords, desired to make increases in the rent of the house under the Increase of Rent, &c. (Restrictions) Act, 1920, s. 2, sub-s. 1 (*a*), (*c*) and (*d*). (1)

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2: "(1.) The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say:—

(*a*) Where the landlord has since the fourth day of August, 1914, incurred, or hereafter incurs, expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs), an amount calculated at a rate per annum not exceeding six, or, in the case of such expenditure incurred after the passing of this Act, eight per cent. of the amount so expended:

Provided that the tenant may apply to the county court for an order suspending or reducing such increase on the ground that such expenditure

As to the increases of rent under clauses (*c*) and (*d*), amounting together to 40 per cent. of the net rent, the plaintiffs alleged that the deduction of rates to be made from the standard rent in order to arrive at the net rent on which these increases were to be calculated should be a deduction of only the compounded rate paid by them and not of the full amount of the rates as assessed.

As to the increase under cl. (*a*) the plaintiffs alleged that the work done by them at the house was an improvement or structural alteration of the house and that they were entitled to an increase of rent at a rate calculated on the amount of their expenditure on the work.

The defendant declined to pay these increased amounts of rent, and the plaintiffs accordingly brought an action against him in the county court claiming to recover 3*l.* 2*s.* 11*d.* for arrears of these increased amounts of rent from September 16, 1935, to January 20, 1936.

The county court judge held that the plaintiffs were not bound to deduct more than the amount of the compounded rate from the standard rent, and were entitled to base the increase of 40 per cent. upon the figure thus arrived at; that the work done by the plaintiffs at the house was an improvement and was structural and that they were entitled to an

is or was unnecessary in whole or in part, and the court may make an order accordingly:

(*b*) An amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included the third day of August, 1914, ...

(*c*) In addition to any such amounts as aforesaid, an amount not exceeding fifteen per centum of the net rent: . . . .

(*d*) In further addition to any such amounts as aforesaid—(i.) where the landlord is responsible for the whole of the repairs, an amount not exceeding twenty-five per cent. of the net rent; . . . ."

Sect. 12: "(1.) For the purposes of this Act, except where the context otherwise requires:— . . . .

(*c*) The expression 'net rent' means, where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent."

C. A.
1936

STROOD ESTATES CO.
v.
GREGORY.

increase of rent in respect of it equal to 8 per cent. of their expenditure; and he gave judgment for the plaintiffs for the amount of their claim.

The defendant appealed.

T. F. Southall and *J. D. Walker* for the defendant, appellant. The plaintiffs, as landlords of the dwelling-house, are not entitled under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to any of the increases of rent which have been allowed to them by the county court judge. The amounts by which the standard rent of the dwelling-house may be increased under s. 2, sub-s. 1 (*c*) and (*d*), of the Act are percentages of the net rent and before they can be determined it is necessary to ascertain the meaning of net rent. That expression is defined by s. 12, sub-s. 1 (*c*), which provides that for the purposes of the Act, except where the context otherwise requires, "net rent" means "where the landlord" in 1914 "paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent." Net rent is thus defined as being, in cases where the landlord paid the rates, "the standard rent less the amount of such rates," and "such rates" are "the rates chargeable on . . . . the occupier" as previously mentioned. Hence net rent means the standard rent less the rates chargeable on the occupier. The expression plainly means the full rate as assessed, and under and ever since the original Poor Relief Act, 1601 (43 Eliz. c. 2), the mode of assessing rates has been to make the full amount of the rate chargeable upon the occupier. In *Nicholson* v. *Jackson* (1) Lord Cave, when interpreting the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), s. 1, sub-s. 1 (iv.), said that if that Act had intended to refer to the full rate it would have "used the simpler phrase 'the amount of such rates.'" (2) These words are the very words which are actually used in the definition of "net rent"

(1) 37 Times L. R. 887.

(2) Ibid. 889.

C. A.
1936

STROOD ESTATES CO.
v.
GREGORY.

in s. 12, sub-s. 1 (*c*), of the Act of 1920, and that dictum therefore supports the view that the rates intended in the latter clause are the full rates as assessed. The cases of *Hodgkinson* v. *Hewitt* (1) and *Evans* v. *Baxter* (2) were under s. 2, sub-s. 1 (*b*), of the Act of 1920, and are distinguishable from the present case. The object of the ascertainment of net rent is to discover what the landlord was receiving in August, 1914, as rent, that is to say as an equivalent for supplying the house to the tenant. Where the tenant paid the full rates the landlord received a smaller rent, which was the same as the net rent. Where the landlord paid the rates he received a larger rent, part of which was in respect of the rates, and, in that case, in order to arrive at net rent the full rates must be deducted, or the resulting amount would be different from the rent actually received by the landlord. A composition of rates pursuant to any Act, while it is no doubt authorized by the Act, is nevertheless a matter of private contract between the landlord and the rating authority in which the occupier has no part. In estimating the rates chargeable on the occupier, which have to be deducted from the standard rent in order to arrive at the net rent, all such compositions must, therefore, be ignored. Even where the landlord has compounded, if he leaves the rates unpaid, the goods of the occupier can be distrained for the full amount of the rate, and in that case the occupier may deduct that amount from his rent: see Poor Rate Assessment and Collection Act, 1869, s. 12, and Rating and Valuation Act, 1925, s. 11. If the decision of the county court judge be upheld, the landlord will be able to make a profit at the expense of both the rating authority and the tenant. The Rent Restriction Acts were passed in the interest of the tenant, and if there is any ambiguity in s. 12, sub-s. 1 (*c*), of the Act of 1920, it should be construed so as to favour the scheme of the Act.

The plaintiffs as landlords are not entitled to an increase of rent under s. 2, sub-s. 1 (*a*), of the Act of 1920 in respect of structural improvements to the dwelling-house. It is a term of the tenancy that the plaintiffs shall be liable for all the repairs,

(1) 139 L. T. 401; 44 Times L. R. 694.

(2) 46 Times L. R. 270.

and that is a liability which is not affected by the Rent Acts, and which a landlord cannot pass on to his tenant: see *Keeves* v. *Dean*. (1) Further, by the Housing Act, 1925, s. 1, the plaintiffs are bound to keep the house reasonably fit for human habitation.

F. D. McIntyre for the plaintiffs, respondents. The plaintiffs, as landlords of the dwelling-house, are entitled under the Increase of Rent, &c. (Restrictions) Act, 1920, to all the increases of rent allowed to them by the county court judge, and this appeal should be dismissed. The plaintiffs are entitled under s. 2, sub-s. 1 (*c*) and (*d*), of that Act to the respective increases therein mentioned of 15 per cent. and 25 per cent., amounting together to an increase of 40 per cent. of the "net rent" of the dwelling-house. As has already been pointed out, s. 12, sub-s. 1 (*c*), provides that for the purposes of the Act, except where the context otherwise requires, the expression "net rent" means "where the landlord" in 1914 "paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates," and in any other case the standard rent; and the first question here is what is the true construction of that definition clause. It is obvious that according to that definition the "net rent" is "the standard rent less the amount of such rates," and the question comes to be what do these last words "such rates" mean. It is submitted that they must be read in connection with the preceding words "where the landlord . . . . paid the rates," and that they mean the rates actually paid by the landlord as distinct from the rate nominally assessed. If that be the correct construction of the definition clause, then the "net rent" for the purposes of s. 2, sub-s. 1 (*c*) and (*d*), is the standard rent less only the rates actually paid by the landlord though less than the rates assessed. The meaning of the definition is not altered by the addition of the word "chargeable." That word means recoverable, and the clause implies that the landlord by his actual payment has discharged the amount which might otherwise have been recovered from the occupier. By paying a compounded rate the landlord saves the occupier from being chargeable with the full assessed rate. The language of the definition clause resembles that of the repealed Increase of Rent, &c. (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), s. 1, sub-s. 1 (iv.), which provided: "Where the landlord pays the rates chargeable on, or which but for the enactments relating to compounding would be chargeable on, the occupier" an increase of rent shall be permissible which does not exceed any increase in the rates. In *Nicholson* v. *Jackson* (1) it was held by a majority of the House of Lords, affirming the Court of Appeal, that under that clause of the former Act the landlord was not entitled to increase the rent by the amount of the increase in the rates as assessed, but only by the amount of the increase in the net or compounded rates actually paid by him. In like manner s. 12, sub-s. 1 (*c*), of the Act of 1920 should be construed as meaning that in such a case as this, the rates to be deducted from the standard rent in order to arrive at the net rent are not the full assessed rates but only the compounded rates actually paid by the landlord. In that case the view taken on the whole by the members of the Court was that "pays" in the clause there under construction implied actual payment, and in the clause here in question the word "paid" should be similarly understood. If s. 12, sub-s. 1 (*c*), in providing that "net rent . . . . means the standard rent less the amount of such rates," may be read as signifying that that expression may mean either the standard rent less the net or compounded rates actually paid by the landlord, or the standard rent less the full rates chargeable on the occupier, then that provision is ambiguous and there are two alternative definitions of "net rent" either of which may be applied to that expression wherever it occurs in the Act, "except where the context otherwise requires." If the former of these alternative definitions of "net rent" be applied to that expression in s. 2, sub-s. 1 (*c*) and (*d*), there is in relation to these clauses no context which otherwise requires and that definition may be properly there adopted. But if the second of these alternative

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(1) [1924] 1 K. B. 685.

(1) 37 Times L. R. 887, affirming 36 Times L. R. 854.

C. A.
1936

STROOD ESTATES CO.
v.
GREGORY.

definitions be applied to that expression in these clauses there is in relation to these clauses a context which otherwise requires—namely, cl. (*b*) of the same sub-section, which has been held to refer to the compounded rate paid by the landlord and not to the full rate chargeable upon the occupier : *Evans* v. *Baxter*. (1) It is said that, if " net rent " be held to mean the standard rent less the compounded rate only, the landlord will make a profit at the expense of both the rating authority and the tenant. On the other hand, unless that meaning be adopted the landlord will derive no advantage whatever from his having compounded for the rates. In the present case the plaintiffs, as landlords, did not pay the full rate assessable on the dwelling-house or chargeable on the occupier, but only a compounded or reduced rate in accordance with the Poor Rate Assessment and Collection Act, 1869, ss. 3 and 4, and the Public Health Act, 1875, s. 211 ; and therefore the net rent, to a 40 per cent. increase of which the plaintiffs are entitled, is the standard rent less only that smaller compounded rate. Under the tenancies of a very large number of small controlled dwelling-houses the landlord pays a compounded rate, and if it be held that the net rent on which the increased rent is to be based is in all cases the standard rent less the full rate, very many landlords will be prevented from obtaining more than a very limited increase of rent. Ever since 1920 landlords have proceeded on the footing that the net rent of which they are entitled to an increase is the standard rent less only the compounded rate, and if this Court should reverse the judgment of the county court judge in the present case its decision will revolutionize the practice throughout the country in regard to increase of rent. The plaintiffs are also entitled to an increase of rent under s. 2, sub-s. 1 (*a*), in respect of improvements and structural alterations of the house, and the county court judge has rightly allowed them an increase of rent equal to 8 per cent. of the amount expended by them on these improvements and alterations.

May 21. The considered judgment of the Court (SIR BOYD

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(1) 46 Times L. R. 270.

MERRIMAN P., SCOTT L.J., and EVE J.) was delivered as follows by

SIR BOYD MERRIMAN P. My brethren desire me to say that they agree with the judgment I am about to read, which will, therefore, be the judgment of the whole Court.

This is an appeal from a decision of his honour judge Clements, sitting at the Rochester County Court, upon the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The appeal raises two questions in connection with the increases in rent which are permitted, by s. 2 of that Act, to be made in respect of a tenancy to which the Act applies. The first question concerns the interpretation of the definition of " net rent " contained in s. 12, sub-s. 1 (*c*), of the Act and affects two classes of increase, which are permitted in terms of a percentage on the " net rent." The other question relates to the increases permitted in respect of structural alterations. Before I deal with these questions specifically, it will be useful to consider the scope of s. 2, sub-s. 1, of the Act as a whole.

There are five subjects in respect of which an increase of the standard rent, in the case of what is familiarly known as a statutory tenancy, may be made. Of these the fifth, dealt with by s. 2, sub-s. 1 (*e*), relates to dwelling-houses let by a railway company to persons in the employment of the company, and is irrelevant for present purposes. Of the remaining four, the first, dealt with in sub-s. 1 (*a*), relates to expenditure on the improvement or structural alteration of the dwelling-house, not including expenditure on decoration or repairs. In respect of this, the landlord is allowed to increase the rent by a percentage, varying according to circumstances, of the amount so expended; but the tenant may apply for an order suspending or reducing such increase on the ground that such expenditure is, or was, unnecessary in whole or in part. The second increase, dealt with in sub-s. 1 (*b*), relates to any increase in rates payable by the landlord over the corresponding amount paid by the landlord at the time of the commencement of the statutory tenancy. So far the Act gives effect to the principle established, though in somewhat different language, by the corresponding enactments of

s. 1, sub-s. 1, provisos (ii.) and (iv.), of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. The third and fourth "permitted increases" appear for the first time in the Act of 1920. The third, dealt with in sub-s. 1 (*c*), is an arbitrary addition of a percentage which, though the object for which it is given is not expressed in the statute, is generally regarded as a recognition, in favour of the landlord, of the economic conditions which prevailed after the war. The fourth, dealt with in sub-s. 1 (*d*), relates to the landlord's liability for repairs, in respect of which, where the landlord is responsible for the whole of the repairs, a fixed percentage is allowed, and where he is responsible for part, but not the whole of the repairs, such lesser sum as, failing agreement, may be determined by the county court judge. Where, as in this case, the landlord is responsible for the whole of the repairs, the percentage allowed is 25 per cent.; and, in such a case, by the combined effect of paras. (*c*) and (*d*) of the sub-section, 40 per cent. in all is allowed. These increases are often loosely described together as "the 40 per cent. increase," and as for the purposes of this appeal there is no distinction between the two, I will use that description to avoid unnecessary repetition. The "40 per cent. increase" is to be calculated upon the "net rent": this expression in turn is defined in s. 12, sub-s. 1 (*c*), of the Act.

It will be seen at the outset, therefore, that whereas paras. (*a*) and (*b*) deal with the reimbursement of the landlord in respect of actual expenditure, the test in respect of "the 40 per cent. increase" is not actual expenditure by the landlord at all, though it is true that by sub-s. 2 of s. 2 either the tenant or the sanitary authority may apply to the Court for an order suspending the increase on the ground that the house is not reasonably fit for human habitation, or is not otherwise in a reasonable state of repair, until such time as the necessary work is done. In other words, in respect of the later paragraphs an arbitrary percentage is allowed, not dependent upon actual expenditure, and what is called "net rent" is selected as the basis on which that percentage is to be allowed. It is obvious that the "net rent" is selected as the basis of the calculation so as to show that the object in view is to compensate the landlord for his inability to make a fresh letting in the open market, by adding a proportion to what may be supposed to have reached his pocket in respect of the dwelling-house at the time immediately preceding the war; but it goes without saying that a different percentage on some other basis could have produced the same arbitrary result.

As I have said, the first, and most important, of the two points raised in this appeal depends upon the interpretation of the definition "net rent." By s. 12, sub-s. 1 (*c*), "net rent" means: "where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent." The point arises in connection with the benefit, whether by way of allowance, rebate, deductions or commission given to a landlord in respect of his assuming by agreement, or being compelled by some public or local statute to undertake, the burden of the rates, and may be stated as follows: Do the words "the amount of such rates" which is the amount to be deducted from the standard rent in order to arrive at the "net rent" mean the full rate which would be levied upon an occupier, or the rate less what I will call, for the sake of brevity, the compounding allowance? In other words, is the deduction which is to be made from the standard rent in order to arrive at the "net rent" the amount paid by the landlord in respect of such rates, or is it the full amount of the rates the liability for which the landlord can discharge by payment of that sum less the compounding allowance? Since what the landlord is to be allowed to charge is 40 per cent. upon the "net rent," it is manifestly to his advantage to establish that the deduction is of the rate less the compounding allowance, since the smaller the deduction the larger will be the "net rent" on which the percentage is to be calculated. This contention has found favour with the learned county court judge, and the question is whether it is right or not. The amount at stake in connection with the particular tenancy is trifling, but it is common ground that the principle is of importance in connection with a considerable number of tenancies to which the Act applies.

Before I consider the difficulties arising out of the definition of "net rent" I wish to emphasize again the contrast between paras. (*a*) and (*b*) of s. 2, sub-s. 1, on the one hand and paras. (*c*) and (*d*) on the other. Paras. (*a*) and (*b*) are designed to effect reimbursement for actual expenditure by the individual landlord. In respect of these permitted increases, expenditure with regard to improvements or structural alterations on the one hand, or increased rates on the other, is the sole test. As regards the poor rate, which historically is the original rate, it is a fundamental principle that rates are levied upon the occupier, apart from special cases provided for by comparatively recent legislation. It is also a commonplace to say that within a given rating area the method of assessment in respect of similar classes of hereditaments must be uniform and that a uniform rate in the pound must be imposed upon each hereditament in the class. The statutory provisions, public or local, compelling or enabling a landlord to assume liability for the rate and allowing him to discharge the liability by a composition in no way infringes this principle, whether the primary liability for the rate remains upon the occupier, or is transferred to the landlord; and if transferred, whether the transfer is by agreement or by compulsion. Though the liability may be discharged by payment of a lesser sum, the rate remains the same throughout. This is clearly seen by reference to ss. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869, which was the public statute relating to compounding the poor rates in force at the material date. I have referred, for the sake of brevity, to the compounding allowance; but the references in the Rent Restriction Acts to the payment of rates by landlords are necessarily in somewhat general terms; and it may be that the specific references to compounding allowances in proviso (iv.) of sub-s. 1 of s. 1 of the Act of 1915 were deliberately dropped, and the somewhat more general wording of the definition with which we are concerned was used instead in the Act of 1920, because the word "compounding" may not have been sufficiently comprehensive to describe the position under certain local Acts. With regard to the district rate provided for by s. 211 of the Public Health Act, 1875, the matter stands somewhat differently. Sub-s. 1 of that section recognizes the general principle that the occupier is rateable, but by para. (*a*) the owner, instead of the occupier, may at the option of the urban authority be rated in certain specified cases, provided that in cases where the owner is rated instead of the occupier he is to be assessed upon such reduced estimate, not being less than two-thirds nor more than four-fifths of the net annual value, as the urban authority deem reasonable, of the net rateable value ascertained for the purpose of the poor rate, and provided that where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such estimate may be made upon one-half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate levied on the occupiers. It will be seen that in this case the liability for the rate itself is imposed upon the owner, and is to be assessed on a lower estimate of annual value than would be the case if the occupier (if any) were rated. Even so, however, it is plain that the section, recognizing the principle that district rates, like poor rates, are primarily made and levied on the occupier, provides that the reduced assessment of the annual value shall be made on a proportion of the full assessment, in terms of the poor rate, which would be made upon the occupier, whether there is or is not such an occupier in fact. Though it must be recognized that a difficulty is created by providing that the owner shall be assessed on a reduced annual value, I am of opinion that the same conception underlies this section as that which underlies ss. 3 and 4 of the Act of 1869—namely, that the landlord is allowed to discharge the full rate by payment of something less. The words "on one-half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers," must refer to the full assessment and the words "the rate" in that sentence can only mean the full rate and not the rate payable by the landlord, which can never be the same amount. None of these difficulties would arise if it were permissible to look at s. 11 of the Rating and Valuation Act, 1925, which, subject to the power of any rating authority, in whose area a local Act is in force, to resolve otherwise, substitutes a uniform system of compounding applicable to all rates for the diverse provisions of various public and local Acts relating to different classes of rates. In this Act it is quite plain that the rate always means the full rate leviable upon the occupier and that the various allowances or deductions in favour of the compounding owner are made therefrom. But it is common ground that for the purposes of s. 12, sub-s. 1 (*c*), of the Increase of Rent, &c., Act, 1920, it is the various public or local Acts in force in 1920 which must be looked at, though on the different wording of s. 2, sub-s. 1 (*b*), of the Act it was proper to refer to the Rating Act, 1925: see *Evans* v. *Baxter*. (1)

With regard to the permitted increase in respect of rates payable by the landlord it has been held by the House of Lords in *Nicholson* v. *Jackson* (2) upon the wording of s. 1, sub-s. 1, proviso (iv.), of the Act of 1915 that the measure of the increase allowed is the increase less the appropriate compounding allowance. The same has been held, with regard to the increase permitted by para. (*b*) of s. 2, sub-s. 1, of the Act of 1920, by a Divisional Court in *Evans* v. *Baxter*. (1) See also with regard to a local Act *Hodgkinson* v. *Hewitt*. (3) It is worth noting in passing that the structure of the Acts of 1915 and 1920 differs somewhat. In the Act of 1915 any increase above the standard rent is prohibited, but with regard to the rates it is enacted by s. 1, sub-s. 1, proviso (iv.), that the increase in respect of additional rates shall not be deemed to be an increase. By s. 2 of the Act of 1920, on the other hand, certain increases, of which this is one, are expressly permitted. In both Acts, however, the test is the increase in " the amount for the time being payable by

(1) 46 Times L. R. 270.
(2) 37 Times L. R. 887.
(3) 139 L. T. 401; 44 Times L. R. 694.

the landlord" over the "corresponding amount paid" in the pre-war period, "the amount payable" being held to be the amount by payment of which the landlord, taking advantage of the enactments in his favour relating to the compounding allowance, could discharge his liability at the later period, and the "corresponding amount paid" at the earlier period being calculated on the same basis.

Counsel for the landlords in this case seeks to apply the same reasoning to the definition of "net rent" and argues that the words "where the landlord . . . . paid the rates," read with the words "the amount of such rates" in the definition of "net rent" in s. 12, sub-s. 1 (*c*), must be interpreted in the same way, and that the definition refers, therefore, to the sum by payment of which the landlord can discharge the liability for rates and not to the amount of the rates themselves. In my opinion this argument is fallacious. I see no reason, where the wording is not the same, for importing into the notional calculation under paras. (*c*) and (*d*) of s. 2, sub-s. 1, an interpretation based on the entirely different conception underlying paras. (*a*) and (*b*) of that sub-section. It was hardly disputed that the words "the amount of such rates" taken by themselves would naturally be taken to describe the full amount of the rates; but it was said that these words are qualified by the earlier words "where the landlord . . . . paid," thus leading to the conclusion that the amount paid in discharge of the rates, and not the amount of the rates themselves, was intended to be deducted. This brings me to a closer examination of the definition of "net rent" in s. 12, sub-s. 1 (*c*). It is agreed that for the purpose of this case the words "the time by reference to which the standard rent is calculated paid the rates chargeable on . . . . the occupier" mean August 3, 1914. The definition, therefore, may be read as follows: "The expression 'net rent' means, where the landlord on August 3, 1914, paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent." In this definition it is the earlier of the two contrasted periods by reference to which the landlord is described as having "paid the rates," whereas proviso (iv.) in s. 1, sub-s. 1, of the Act of 1915 begins with the words "where the landlord pays the rates" referring to the later of the two contrasted periods. Also, for some such reason as I have already suggested, there is no specific reference in the definition which we have to construe to the enactments relating to compounding. Now it is obvious that if the words "the landlord . . . . paid the rates" are to be construed as a literal statement of the facts as regards payment particular to the individual landlord, his actual conduct as regards payment in the period comprising August 3, 1914, would affect the whole calculation, with results differing according to the circumstances. Moreover, assuming him to be a landlord who was punctual in the payment of his rates in that period and entitled, therefore, to deduct the compounding allowance, it could never be literally true that on August 3, 1914, he "paid the rates chargeable on . . . . the occupier," for in fact he would pay those rates less the compounding allowance. Likewise, in the cases provided for by s. 4 of the Poor Rate Assessment and Collection Act, 1869, as regards the poor rate, and by s. 211 of the Public Health Act, 1875, as regards the district rate, it is not literally true to say that such a landlord "paid the rates . . . . which but for the provisions of any Act would be chargeable on the occupier," since the payment which the landlord made was less than the occupier would have had to make if he were liable to be rated at all, which, ex hypothesi, he was not. Moreover, by both these sections, as has already been seen, an owner who was willing in August, 1914, to be rated, notwithstanding that the hereditament was unoccupied, was entitled to a further allowance or rebate. In such a case, notwithstanding that there was no occupier at all who could, even hypothetically, "but for the provisions of any Act . . . . be chargeable," the landlord had to pay the rates less the appropriate compounding allowance. The phrase last quoted makes nonsense if read as an actual description of that which the individual landlord paid in such circumstances. If the individual facts were really relevant it might be necessary to ascertain, for example, whether in 1914 the landlord took cash to the town hall, or, if he paid by cheque, whether it was honoured, and in either event whether he paid punctually or unpunctually, so as to earn or forfeit the compounding allowance; or whether, if the landlord failed to pay the full rate, distraint was levied upon the tenant under s. 12 of the Poor Rate Assessment and Collection Act, 1869, or alternatively whether the landlord was sued for, and execution was issued upon him for, the amount of the rates; or whether, failing all other means of levying the rates, the actual landlord was committed to prison for non-payment. Moreover, it would appear that if the landlord made default altogether for that particular period in 1914, no subsequent landlord, however much the rates increased, and however punctilious he was in paying them, could ever claim the permitted increase. But, in my opinion, all such considerations are beside the mark.

In *Nicholson* v. *Jackson* (1) the House of Lords held that the opening words of proviso (iv.) to s. 1, sub-s. 1, of the Act of 1915, which, except for the change of tense, correspond closely with the words of the definition of "net rent," meant simply that the landlord was one of the class of landlords who paid rates instead of the occupier. There may be some reason, peculiar to this group of legislation, which made it impossible for Parliament to indicate this in language less involved. Be that as it may, I see no reason for placing a different interpretation on the words occurring in the definition of "net rent" in s. 12, sub-s. 1 (*c*), of the Act of 1920. If anything, it is more imperative so to do than it is in relation to the Act of 1915. Indeed, it was not seriously contended on either side that the words bear any other interpretation. But, when once it is realized that the phrase is nothing more than a description of a class of landlord, there is no reason for allowing the words "the landlord . . . . paid" to qualify in any way the plain meaning of the words "the amount of such rates." I am glad to think that this view of the meaning of the words "the amount of such rates" was anticipated (obiter) by Lord Cave in *Nicholson* v. *Jackson*. (1) In holding that the words "the amount for the time being payable by the landlord in respect of such rates" meant the amount actually payable by him having regard to his compounding agreement, he added that if the draftsman had intended to refer to the full rates he would surely have used the simpler phrase "the amount of such rates." (2) As the arguments are not reported, it is impossible to say whether or not Lord Cave was deliberately quoting these words from the Act of 1920, which had already been in force for some time; but it is significant that the noble Lord selected, as describing the full rates in contrast with the rate less the compounding allowance, the very words we are called upon to construe.

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(1) 37 Times L. R. 887.

Mr. McIntyre also argued that as the words of the definition were ambiguous, he was entitled to rely on the words "except where the context otherwise requires," which qualify all the definitions in s. 12; and that as para. (*b*) of s. 2, sub-s. 1, had been construed as referring to the net payment, the context required that in paras. (*c*) and (*d*) the same reasoning should be imported into the calculation of the "net rent." I have already said that there seems to be no justification for importing into paragraphs dealing with an arbitrary calculation the construction of a separate paragraph relating to actual facts; but apart from this consideration, I am unable to see how the application of the words "except where the context otherwise requires" to this definition assists his argument. There is no context for the use of the words "the net rent" except in the two paragraphs relating to "the 40 per cent. increase." The definition, therefore, can only refer to this context, and must be so applied. Such difficulty as there may be in construing the definition cannot be avoided by ignoring it. In my opinion, the judgment of the county court judge on this point was wrong.

The second point can be disposed of more briefly. The learned county court judge held that the respondents were entitled to an increase calculated at the rate of 8 per cent. on the expenditure on certain improvements or structural alterations under para. (*a*) of s. 2, sub-s. 1. It is not disputed that the work done, consisting as it did in the substitution, to the satisfaction of the local authority, of a modern and efficient sanitary system, in place of an antiquated system, which did not meet the requirements of the local authority, constituted an improvement, and was structural. Mr. Southall, however, relied on s. 1 of the Housing Act, 1925, whereby an undertaking that the house will be kept by the landlord during the tenancy in all respects reasonably fit for human habitation is to be implied in the contract for letting for habitation a dwelling-house of a class which includes the dwelling-house in question, and upon evidence given by the chief sanitary inspector of the local authority that the houses, that is to say before the work was done, were not in all respects fit for habitation in accordance with the section. He argued, therefore, that the obligation to do the work was a term of the tenancy and that it followed from the ordinary principles of contract that the expenditure on such improvements or structural alterations could not be transferred to the tenant during the subsistence of the tenancy. We did not think it necessary to call upon the respondents upon this point, but in deference to Mr. Southall's argument, though it was not very strongly pressed, I must say shortly why I think this objection to the county court judge's judgment is untenable. So far as it is relevant for present purposes the scheme of the group of sections in Part 1 of the Act dealing with this obligation of the landlords may be summarized as follows: First there is the statutory imposition, on the owner, of the undertaking I have already quoted, but if the owner can satisfy the local authority, or failing them, the Minister of Health, that the house cannot, without reconstruction, be made fit for human habitation, he may give notice of his intention to close the house. If this provision comes into operation, it has the same effect as if a closing order had been made, and the local authority may acquire the house compulsorily as if it were land that had been included in a reconstruction scheme on account of the sanitary condition of the premises thereon; subject to this, if the owner fails to comply with the notice the local authority may do the work and charge him with the expenses incurred. Turning to para. (*a*) of s. 2, sub-s. 1, of the Act of 1920, it is important to observe that it is provided that the tenant may apply to the county court for an order suspending or reducing this permitted increase on the ground that the expenditure on the improvements or structural alterations of the dwelling-house is, or was, unnecessary in whole or in part. As the subject-matter is a dwelling-house it may, I think, fairly be assumed that in using the word "unnecessary" the Legislature meant that the work in respect of which the expenditure was incurred must be necessary for the purpose for which a dwelling-house is used—namely, for human habitation. Mr. Southall's argument, therefore, would involve reading this paragraph somewhat as follows: The landlord may recover a percentage on such expenditure on improvements or structural alterations as is necessary to render the dwelling-house fit for human habitation, but expenditure on improvements or structural alterations incurred by virtue of the obligation imposed by s. 1 of the Housing Act, 1925, to keep the house in all respects fit for human habitation is not expenditure on improvements or structural alterations within the meaning of para. (*a*) of s. 1, sub-s. 1, of the Act of 1920. The fallacy seems to me to lie in applying the ordinary principles of contract to the so-called "statutory tenancy." Apart from the Rent Acts the owner of a dwelling-house on which expenditure in respect of the undertaking imposed by the Housing Act, 1925, was incurred, could give the necessary notice to quit and then raise the rent to compensate himself for the expenditure. The "statutory tenancy" is not, properly speaking, a tenancy at all. It confers, as the late Lush J. called it in *Keeves* v. *Dean* (1), "a status of irremovability" on the tenant, though it is true that such terms of the original contract as are applicable survive. It would work an obvious injustice on the owner if he were unable to recover the increase

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(1) 37 Times L. R. 887.

(2) Ibid. 889.

(1) [1924] 1 K. B. 685, 686.

permitted by the Act of 1920 in respect of alterations to a dwelling-house the tenancy of which he cannot terminate by an ordinary notice to quit, because subsequent legislation had imposed in respect of that class of dwelling-house, whether controlled or not, an obligation to make structural alterations of that very character. In respect of the category of houses falling not only within s. 1 of the Housing Act, 1925, but within s. 2 of the Rent Act, 1933, the injustice would be still more glaring, inasmuch as by the latter section such houses are excluded from the decontrolling provisions of s. 2 of the Act of 1923. I am satisfied that the Legislature had no such intention, and that the learned county court judge was right in holding that this increase was recoverable.

In terms of money the permitted increase in respect of the structural alterations is 1*s.* 0¼*d.* per week. In respect of the 40 per cent. increase the amount is 1 3/5 pence per week. It follows from this judgment that the amount for which the learned county court judge has given judgment must be reduced by 1 3/5 pence multiplied by the number of weeks in respect of which arrears of rent were claimed; that is from September 16, 1935, to January 20, 1936. As I am not sure whether those dates are inclusive or exclusive, the parties must work out the arithmetic themselves. The learned county court judge's order will be varied accordingly.

With regard to costs, as most of the time in the court below appears to have been occupied in fighting the issue with regard to structural repairs, which represented a very small proportion of the time expended upon the appeal, I think the justice of the matter will be met if each party bears his own costs below and the appellant has three-quarters of the costs of the appeal.

Appeal allowed in part.

Solicitor for appellant: *W. H. Thompson.*

Solicitors for respondents: *Deacon & Co., for Arnold, Tuff & Grimwade, Rochester.*

J. R.

1936
May 6.

THE KING *v.* SALFORD ASSESSMENT COMMITTEE.

Ex parte OGDEN.

Rating—Proposal to amend valuation list—Objection to proposal by Rating Authority before Assessment Committee—Appointment of officer of Rating Authority as clerk to Assessment Committee—Validity—Bias—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 55, *sub-s.* 1; *Sch. I., cl.* 12; *Sch. IV., Part III., cl.* 4—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.

An officer of the rating authority was appointed by the assessment committee clerk to that committee, which would have to consider an objection by the rating authority to a proposal to amend the valuation list. On an application to quash the resolution appointing him clerk to the assessment committee on an allegation of liability to suspicion of bias :—

Held, that the appointment was valid.

RULE NISI for prohibition.

The rule called upon the Salford assessment committee to show cause why a writ of prohibition should not issue to prohibit them from acting on a resolution whereby they appointed as their acting clerk one W. Brown, an officer employed as chief committees clerk and elections officer in the town clerk's department of the Salford City Council, the rating authority. The grounds of the rule were (i.) that the resolution was ultra vires and against the provisions of Sch. I., cl. 12, and Sch. IV., Part III., cl. 4, of the Rating and Valuation Act, 1925; (ii.) that Mr. Brown was so related to the Salford rating authority, which was the party appearing in opposition to the applicant, Charles Ogden, on a proposal by him to amend the valuation list, as to be unfit to occupy the position of acting clerk to the assessment committee; and (iii.) that it might reasonably be expected that Mr. Brown had a real bias, and that justice would not appear to be done if he acted as such clerk.

The applicant, Ogden, the owner of a cinema in Salford, on February 12, 1935, made a proposal to amend the valuation list made by the Salford City Council as the rating authority, and signed by the said W. Brown as their clerk. On

February 14, 1935, the council gave notice of objection to this proposal, and thereby, by virtue of s. 27, sub-s. 1, of the Act of 1925, became a party to the question before the assessment committee. The resolution appointing Mr. Brown to be acting clerk to the assessment committee was dated June 26, 1935.

This rule was then obtained.

Erskine Simes showed cause. The assessment committee is given the widest powers of appointing its officers by s. 55, sub-s. 1, of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), which enacts that they may appoint "such . . . . officers as they think fit." Persons disqualified to act on an assessment committee are enumerated in cl. 12 of Sch. I. to the Act of 1925. Mr. Brown does not come within the first limb of that clause because he is not a member of any committee to which the duties of the rating authority were delegated; the rating authority here does its own work. Nor is he within the second limb, because he was not appointed by the rating authority but by the assessment committee itself. Nor is he disqualified under cl. 4 of Sch. IV. to the Act of 1925, because he is not a party to this matter before the committee.

[*Rex* v. *North East Surrey Assessment Committee. Ex parte F. W. Woolworth & Co.* (1) was referred to.]

It is true that he is in the employment of the rating authority, which is a party to this matter; but that fact, in the circumstances, could hardly arouse a suspicion of bias in the mind of any reasonable man, those circumstances being, that by s. 15, sub-s. 1, of the Local Government Act, 1929 (19 Geo. 5, c. 17), the assessment committee may contain a majority, which may be as high as two-thirds of the whole, of members of the council which, under that sub-section, appoints the committee, and may, and in this case does appear before them as a party under s. 27 of the Act of 1925. It would be difficult, where the Legislature has enacted this, to say that the appointment of an officer of the council to be clerk to the assessment committee would give rise to a suspicion of bias.

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(1) [1933] 1 K. B. 776.

[*Rex* v. *North Worcestershire Assessment Committee* (1), per Avory J., was referred to.]

It is significant to note that this question could not arise in the Metropolis, for not only may the town clerk in a Metropolitan borough be clerk to the assessment committee, but s. 18 of the Local Government Act, 1929, where the proviso is similar to cl. 12 of Sch. I. to the Act of 1925, enacts that the town clerk "shall be" clerk to the assessment committee.

Michael Rowe in support. The clerk to the assessment committee is present to advise them, whether on law, procedure, or otherwise, therefore it is highly important that he should be impartial. He should be present to protect the committee from being led into error by the very fact that so large a proportion of its members are members of the rating authority. Being very experienced in the matters which the committee have to decide he will naturally have great influence with them, and it is a further evil that he, an official of the rating authority, should be clerk to a body upon which that authority is so strongly represented.

Lord Hewart C.J. In my opinion this rule ought to be discharged. It is sought that a writ of prohibition may be issued to prohibit the assessment committee of the city of Salford, in Lancashire, from acting upon certain resolutions named in the rule. The point of substance is that it is complained that Mr. Brown has been appointed by the Salford assessment committee to be acting clerk of that committee notwithstanding the fact that he is an officer employed in the town clerk's department of the city council. The argument is based upon two grounds. It is said, first, that holding the position he does this gentleman comes within statutory prohibitions. Secondly, it is said that however that may be his appointment is likely to give rise to a suspicion of bias if he occupies this two-fold appointment.

Our attention has been directed to the relevant sections of the statutes dealing with the powers of assessment committees and their composition, and to the reported cases which are thought to throw some light upon the present matter. It is not necessary, I think, to refer to them in detail. One thing is obvious: although there are certain specific prohibitions naming persons who are not to be able to perform certain acts, persons in the position of Mr. Brown, ex concessis, and as is obvious, are not named in any of those prohibitions, and the fact that others are named and that they are not is a fact of no little importance. If it had been intended to exclude one in the position of Mr. Brown a very few words would have accomplished that purpose. He is not by statute prohibited. But it is said that his appointment and his acting in this two-fold way may reasonably create a suspicion of bias and that therefore the appointment ought to be prohibited in accordance with the well known maxim that it is not only necessary that justice should be done but that it should manifestly appear that justice is done. But when I look at the scheme of this legislation, the very wide powers deliberately given to assessment committees, and the peculiarity of their composition, I cannot think that the fact that this gentleman is employed in the department of the town clerk can, in the mind of any reasonable man, give rise to a real suspicion. Two-thirds of the members of the assessment committee are themselves members of the rating authority: they have at all times a sufficient and satisfactory working majority. The gentleman referred to, by reason of the fact that he is employed in the department of the town clerk, is a servant of the body of which two-thirds of the members of the assessment committee are themselves members, and it seems to me somewhat idle in those circumstances to speak of a suspicion of bias being created because his services are added to the services of two-thirds of the members of the body itself.

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(1) [1929] 2 K. B. 397, 414.

Parliament has (and one must assume deliberately) given to the assessment committee very wide powers and very wide discretion in the appointment of officers. Sect. 55, sub-s. 1, of the Rating and Valuation Act, 1925, provides as follows:

"It shall be lawful for rating authorities, assessment committees, and county valuation committees to appoint for the purposes of this Act such rating officers, valuation officers and other officers as they think fit, and to pay to any officers so appointed such reasonable salaries as they think fit." There is no need to have recourse to the familiar illustration about swallowing a camel and straining at a gnat, but in view of the extent of the powers given to a committee of this kind I cannot think that it would be right to prohibit this committee from acting upon its resolution whereby Mr. Brown is acting as clerk of the committee, notwithstanding the fact that he is a person employed in the town clerk's department. As Mr. Simes has very usefully pointed out, if we were dealing with London instead of Salford the town clerk himself not only might be but must be the officer performing duties of this kind.

I think, therefore, that this rule ought to be discharged.

DU PARCQ J. I agree. Parliament, when constituting the assessment committee, upon which members of the rating authority may be and probably usually are in a very large majority, has been careful to state expressly in what cases persons are not to be permitted to be present during the deliberations of the assessment committee, and there is nothing in that statement to include a person in the position of Mr. Brown. That makes it difficult to say that he ought to be excluded on the ground of what is called, for the sake of brevity, a common law disqualification.

There is one point in this case upon which stress was properly laid by Mr. Rowe, and indeed our attention was called to it by Mr. Simes, and it does no doubt call for consideration. Mr. Brown very frankly says in his affidavit that as part of the duties of a committee clerk he has attended meetings of the rating committee for the purpose of taking minutes of their proceedings. He adds, however, that he does nothing more than record the proceedings and is in no way concerned with their decision and takes no part, either advisory or otherwise, therein. I do not think that the fact that he does attend those meetings makes any difference. It is not disputed that every member of the rating authority who is also a member of the assessment committee, although he may not be permitted to be a member of the rating committee, still has access to the minutes of the rating committee and knows what is going on at the rating committee meetings, and I do not think that any reasonable person would suspect Mr. Brown of bias merely on the ground that he attends on occasion to record what takes place at the meetings of the rating committee. For these reasons, as well as the reasons given by my Lord, I agree that this rule should be discharged.

GODDARD J. I agree. For myself, I should be content to base my judgment solely upon the wording of s. 55, sub-s. 1, of the Rating and Valuation Act, 1925. There is no room for the application of what has been compendiously called the common law rule if the statute is wide enough, because the statute can override or alter any doctrine of common law, and if Parliament chooses to give, as I think it has by that sub-section, the widest possible discretion to committees as to whom they may appoint as their officers, it follows that if they do appoint an officer this Court cannot say he is a wrong person to appoint. A discretion, and a very wide discretion, is given to the committee to appoint him. Consequently, I see no ground for issuing a prohibition in this case, and I agree with the judgments which have been delivered.

Rule discharged.

Solicitors showing cause: *Gregory, Rowcliffe & Co., for Brett & Co., Manchester.*

Solicitors in support: *Peacock & Goddard, for Percy H. Barker & Co., Manchester.*

W. L. L. B.

1936
May 12.

NEWELL *v.* CROSS.

NEWELL *v.* COOK.

NEWELL *v.* PLUME.

NEWELL *v.* CHENERY.

Road traffic—Express carriage—Taxicab—No Road Service Licence—Sharing of fare by passengers—Persons carried " in consideration of separate payments made by them "—Offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-ss.* 1 (*b*), 2 ; *s.* 72, *sub-s.* 10.

Two persons, Miss C. and Mrs. P., severally hired taxicabs (neither of which had a road service licence as an express carriage) to drive themselves and friends to a certain destination and back for 14*s*. in each case. Miss C. had made an antecedent arrangement with her friends that each of them should pay her share of the fare. Mrs. P. had made no such arrangement, though some of her friends in fact subsequently offered to pay and did pay their shares.

On the journey the taxicabs were stopped by a police-officer and a traffic-examiner, who questioned the passengers as to the arrangements for payment, but did not caution them.

The hirers were charged with causing and the drivers with permitting the taxicabs respectively to be used as express carriages when there were not in force licences authorizing them to be so used. The justices dismissed all the summonses, and expressly found that the drivers did not know, and had no reason to know, that the passengers were sharing the fares :—

Held, by the Divisional Court that since there was in Miss C.'s case an antecedent contract for payment by the other passengers of their shares they were " carried in a motor-vehicle in consideration of separate payments made by them," and therefore by s. 61, sub-s. 2, the vehicle was to be " deemed to be a vehicle carrying passengers for hire or reward at separate fares," and was brought within the definition of " express carriage " in sub-s. 1, and Miss C. was therefore guilty of the offence charged.

In the absence of an antecedent contract by Mrs. P. the justices were right in dismissing the charge against her. Nor could it be said that they had erred in law in dismissing the charges against the drivers.

Held, further, that there is no provision of the Road Traffic Act which authorizes the questioning of passengers in taxicabs as to who is paying the fare, or which requires passengers to furnish such information. If such questions are to be asked it is the duty of the officer to administer the usual caution.

CASES stated by Ipswich Justices.

The facts in these four cases being similar, though not identical, they were heard and determined together.

NEWELL v. CROSS.

In this case the respondent, Miss Maudie Cross, was charged on an information preferred by the appellant, Cyril Newell, acting under the authority of the Eastern Traffic Area Commissioners, with having, on November 26, 1935, unlawfully caused a motor-vehicle to be used as an express carriage on a road between Ipswich and Shotley, there not being in force at that time a road service licence authorizing the operation of such a service, contrary to s. 72, sub-s. 10, of the Road Traffic Act, 1930. (1)

The following facts were proved or admitted: On

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(1) The Road Traffic Act, 1930, s. 61, sub-s. 1: "Public service vehicles shall, for the purposes of this Part of this Act and the regulations made thereunder, be divided into the following classes: . . . . (*b*) Express carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than one shilling for a single journey or such greater sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying the appropriate fares for the journey or journeys in question."

Sub-s. 2: "It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not."

Sect. 67, sub-s. 1: "No person shall cause or permit a motor vehicle to be used on any road as . . . . an express carriage . . . . unless he is the holder of a licence (in this Act referred to as 'a public service vehicle licence') to use it as a vehicle of that class in accordance with the provisions of this Part of this Act . . . ."

Sect. 72, sub-s. 1: "Subject to the provisions of this section the commissioners may grant to any person applying therefor a licence (in this Act referred to as a 'road service licence') to provide such a road service as may be specified therein, and a vehicle shall not be used as . . . . an express carriage except under such a licence . . . ."

Sub-s. 10: "If any person uses a vehicle or causes or permits it to be used in contravention of this section . . . . he shall be guilty of an offence."

1936

NEWELL
v.
CROSS,
COOK,
PLUME,
CHENERY.

November 25, 1935, the respondent saw one, Cook, a taxicab driver [the respondent in the second case], on a cab rank, and arranged with him that he should convey her and certain of her friends to Shotley, some ten miles from Ipswich, and back, on November 26. The price to be paid for the journey was 14*s*. At about 8 P.M. on November 26 Cook picked up the respondent and six other ladies at different addresses in Ipswich and conveyed them to a dance at Shotley. During the journey the taxicab was stopped by a police constable and a traffic examiner of the Traffic Commissioners for the Eastern Area, and, in reply to questions put to her, the respondent said that she was paying Cook 14*s*. for the journey and that she would collect 2*s*. from each of her six friends in the cab.

Neither Cook nor the respondent held a road service licence or a public service vehicle licence. On the occasion of the dance at Shotley two omnibuses belonging to the Eastern Counties Omnibus Company went from the Cattle Market, Ipswich, to the dance and returned at the conclusion of the dance, depositing their passengers at the Cattle Market, Ipswich, which was some two miles from the homes of some of the respondent's friends who were with her in the cab. Cook had not previously been to dances at Shotley. He did not know the respondent before November 25, 1935, and had no knowledge that she had collected or intended to collect from the other passengers any part of the fare to be paid to him. He had made no inquiries on the subject, and had taken no steps to prevent any such action by the respondent. The respondent collected 2*s*. from each of her friends towards the fare paid by her.

It was contended on behalf of the appellant that passengers had been carried in the taxicab for hire or reward in consideration of separate payments made by them, and that the respondent had caused the taxicab to be used as an express carriage, and that she was guilty of the offence charged.

It was contended for the respondent that she hired the cab from the rank in the ordinary way, that she arranged a charge of 14*s*. for the journey and paid that sum to Cook at Shotley, and that any licensed omnibus departing from and returning to the terminus at Ipswich would fail to meet her requirements as she and her friends lived at a distance from the terminus.

The attention of the justices was called to *Goldsmith* v. *Deakin.* (1)

The justices were of opinion that the taxicab was not being used as an express carriage, and they found as a fact that the respondent paid the 14*s.* at Shotley, and that she collected 2*s.* from each of the other passengers towards that 14*s.*, and that Cook was not aware of her intention to do so. They accordingly dismissed the information.

NEWELL *v.* COOK.

In this case William Edgar Cook, the driver of Miss Cross's taxicab, was charged, on the same facts as existed in *Newell* v. *Cross*, (*a*) with unlawfully permitting a motor-vehicle to be used as an express carriage without a road service licence, contrary to s. 72, sub-s. 10, of the Road Traffic Act, 1930, and (*b*) with unlawfully permitting it to be so used when he was not the holder of a public service vehicle licence authorizing him to use it as a vehicle of that class, contrary to s. 67 of that Act.

The contentions and findings, so far as they differed from those in *Newell* v. *Cross*, were as follows: (*a*) The appellant contended that the respondent had permitted the taxicab to be used as an express carriage and that it was immaterial whether he had actual knowledge of what was being done. (*b*) The respondent contended that his cab was hired from the cab rank in the ordinary way, and that he did not know, and had no reason to know or to suspect, that Miss Cross had collected or would collect any part of the fare from the other passengers.

The justices were of opinion that the respondent was paid his fare of 14*s.* at Shotley and that he did not know and had no reason to know that any part of such fare was or would be paid by the other passengers. They dismissed the information.

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(1) [1933] W. N. 255; 50 Times L. R. 73.

NEWELL *v.* PLUME.

An information was preferred against the respondent Mrs. Hilda Plume for an offence similar to that with which Miss Cross was charged, and alleged to have been committed on the same date.

The material differences between the present case and that of *Newell* v. *Cross* were that Mrs. Plume, who was a married woman with three daughters, had been going to and fro to dances at Shotley frequently in the previous five years, taking with her her daughters and their friends. About a fortnight before November 26, 1935, she engaged one Chenery, a taxicab driver [the respondent in the fourth case], from the cab rank to take her and her friends to Shotley on November 26. He had frequently driven her there before, and the agreed charge was invariably 14*s*., irrespective of the number of passengers. The respondent admitted that her daughters' friends contributed to the cost of the taxicab on some of these occasions. The passengers were picked up in Lloyds Avenue and the respondent paid Chenery 14*s*. before starting, no part of which had she collected from the other passengers before starting. She admitted that she subsequently received 2*s*. each from two of the passengers and that each of the others still owed her that sum.

The taxicab was stopped at the same point, and by the same officers as in *Newell* v. *Cross*. In reply to questions by the officers one of the passengers said that 2*s*. either had been or would be paid by each of the passengers to the respondent. The figure of 2*s*. was suggested by the traffic examiner.

The appellant's contentions being the same as in *Newell* v. *Cross*, the respondent contended that she had not arranged to charge the other passengers any part of the expense and that she did not in fact charge them or receive any payment from them.

The justices were of opinion that the cab was not being used as an express carriage, and found as a fact that the respondent paid 14*s*. before starting the journey and that no contribution was asked for or received by the respondent from the other passengers. They were further of opinion that on other previous occasions the respondent had received contributions towards the total fare from the other passengers.

NEWELL *v.* CHENERY.

In this case William Chenery was charged on facts identical with those in *Newell* v. *Plume*. The contentions and findings of the justices with regard to lack of knowledge were similar to those in *Newell* v. *Cook*. The information was dismissed.

The prosecutor appealed in all four cases.

Valentine Holmes and *H. P. J. Milmo* for the appellant. Though these cases may appear trivial, the Traffic Commissioners feel it their duty to protect the firms to whom licences have been granted, and who are bound to maintain the licensed services, in some cases at a loss. It is clear that in these cases the friends of Miss Cross and Mrs. Plume were carried in the motor-vehicles for the journey "in consideration of separate payments made by them" to Miss Cross or Mrs. Plume. The vehicles therefore by s. 61, sub-s. 2, of the Road Traffic Act, 1930, were "deemed to be vehicles carrying passengers for hire or reward at separate fares." In other words, on the facts of these cases they became "express carriages" since none of the separate fares was less than one shilling.

[GODDARD J. Do you say that if the members of this Court share a taxicab at the rising of the Court to some common destination, and if we each pay our proportion of the fare, we shall be committing a criminal offence ?]

Yes, but in such a case there would be no prosecution, because the authorities exercise common sense in enforcing the Act.

[DU PARCQ J. That is entirely wrong. If the law leads

1936

NEWELL
v.
CROSS,
COOK,
PLUME,
CHENERY.

to absurdities they should be made apparent by the enforcement of the law, and Parliament should deal with them. Nothing is worse than for authorities entrusted with the enforcement of an Act of Parliament to enforce it or not according to the dictates of "common sense."]

The circumstances of the hiring were such as to put the drivers on inquiry whether the passengers were sharing the fare.

[DU PARCQ J. Is the driver to cross-examine his passengers himself, or must there be a hearing before a judicial tribunal ?]

[LORD HEWART C.J. It is apparent from the case that there was no evidence against these persons except their own admissions in answer to questions—and probably leading questions—from the officers. Was any caution administered ?]

No, my Lord, it would seem not.

[LORD HEWART C.J. If it had been they might well have thought that silence was golden.]

The respondents did not appear and were not represented.

LORD HEWART C.J. This is a group of special cases stated by justices arising from prosecutions under the Road Traffic Act, 1930. By s. 72, sub-s. 10, of that Act, it is provided that if any person uses a vehicle or causes or permits it to be used in contravention of the section he shall be guilty of an offence. The offences dealt with in the informations in the present cases were offences of causing or permitting a motor-vehicle to be used as an express carriage at a time when there was not in force in relation to that motor-vehicle a road service licence. The question which had to be determined in each case was, first of all, whether on the occasion referred to the motor-vehicle was being used as an express carriage ; and, secondly, whether the defendant was causing or permitting that vehicle to be so used.

The law on this matter is tolerably plain. [His Lordship read the material parts of s. 61, sub-ss. 1 and 2.]

These cases raise the question, therefore, what is the position on the one hand of the passenger, and, on the other hand, of the driver or owner of a taxicab as to which no road service licence is in existence and the payment for the use of the taxicab is made by one of the various passengers using the cab, that passenger collecting contributions from his or her fellow-passengers? The answer to that question manifestly depends on the particular facts of the individual case. No doubt it is easy to represent these as hard cases, and, indeed, cases which at first sight appear to be ridiculous. But the task of marshalling the motor traffic on the road is no easy task, and whatever rules are laid down there must be parts of the area of controversy where a line has to be drawn, and wherever the line is drawn a case which is very near it may present hardship. That, however, is no reason why the law as it is should not be enforced, and if its enforcement gives rise to results which appear to be grotesque that is a reason, perhaps, for amending the law. We, at any rate, have to take the statute as we find it.

In the first of these cases Miss Cross, who was charged with causing the motor-vehicle, a taxicab, wrongly to be used as an express carriage, booked it to take her and her friends to a dance at a barracks some ten miles from Ipswich, and agreed beforehand with the driver that the price for the journey should be 14*s.* Seven persons went, and on its journey the taxicab was stopped, a traffic examiner, apparently without any warning, making inquiries as to the way in which payment was being made. The respondent herself told the examiner that she was paying 14*s.* to Cook, the driver, for the journey and that she would collect 2*s.* from each of her friends, six in number, in the taxicab. Clearly, therefore, it was in her mind that she was to collect, and apparently was entitled to collect, a rateable contribution from each one of her fellow passengers. So far as she was concerned that case seems to me, as the law stands, clear.

Other considerations apply with regard to the driver, who was charged with permitting his vehicle to be wrongly used. There are really two findings so far as mere words go with regard to him. In the case of Miss Cross the justices found as a fact that Cook had no knowledge that the respondent had collected or intended to collect any part of the fare from the other passengers. They found only that he made no inquiries. With regard to her they found that the taxicab was not being used as an express carriage. In Cook's case the facts were the same, and the contention of the respondent Cook was that he had no reason to know or suspect that Miss Cross had collected or would collect any part of the fare from the other passengers, and it was added, as part of the contention, that he had never been to Shotley dances before that occasion. The justices again found that the taxicab was not being used as an express carriage, but they also found that Cook did not know, and had no reason to know, that any part of the fare was or would be paid by any of the other passengers.

The law relating to this matter, so far as it needs interpretation beyond the words of the statute itself, is expressed in a single paragraph by Avory J. in the frequently cited case of *Goldsmith* v. *Deakin* (1): " In my opinion, if a person hires out a vehicle in circumstances in which he ought to know that it probably will be or may be used as a stage carriage, and puts his servant in charge of that vehicle to use it in any way that the hirer may choose to direct the servant to use it, then he is, within the meaning of the statute, permitting it to be used as a stage carriage without the proper and appropriate licence." Some of the words in that paragraph are directed to the particular case which was then being considered. The important words, which have a wider significance, are : " Circumstances in which he ought to know that it probably will be or may be used as a stage carriage." The matter is expressed in slightly different language in the next column with reference to another case, *Osborne* v. *Richards*. (2) " He was hiring out his coach and putting his servant in charge of it, and at least leaving it to chance whether it would be used as a stage carriage or not."

Dealing first with the case of Miss Cross, it seems to me that she has, unwittingly no doubt, offended against the law, and I cannot see how in the circumstances the justices could

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(1) [1933] W. N. 255; 50 Times L. R. 73, 74.
(2) [1933] 1 K. B. 283.

1936

NEWELL
v.
CROSS,
COOK,
PLUME,
CHENERY.

Lord Hewart
C.J.

find that she was not within the net. I think therefore that in that case the appeal ought to be allowed and the case remitted to the justices with a direction to find that the offence which was charged was proved. The question of penalty is a totally different matter. There is, happily, on the Statute Book an Act which in a proper case allows justices to refrain even from proceeding to conviction and no more need be heard of the matter.

With regard to the driver Cook, the justices have found that he did not know, nor had he any reason to know, that any part of the fare was or would be paid by any of the other passengers. I am not prepared to say that they came to an erroneous conclusion in point of law in that matter. It is a matter for their good judgment and good sense. I think that they were entitled to dismiss the information, and in that case therefore it seems to me that the appeal ought to be dismissed.

The third case is analogous to the first on slightly different facts. Mrs. Hilda Plume was charged with unlawfully causing a motor-vehicle to be used as an express carriage without a licence. The justices acquitted her, and though the language which they used was slightly ambiguous their meaning can be fairly inferred. They found that the taxicab was not being used as an express carriage, that the respondent paid 14*s.*—that is, the total fare—before starting from Ipswich, and that no contribution was asked for or received towards the charge made from the other passengers in the taxicab. I think it is plain, as Mr. Holmes suggested, that the words "before starting from Ipswich" must be read in that sentence as qualifying the words "was asked for or received," because otherwise that paragraph would contradict the finding of fact that the respondent admitted that she subsequently received sums of 2*s.* each from two of the passengers, and that each of the others still owed her that sum. On the other hand, by way of contrast to the case of Miss Cross, there is nothing satisfactory to indicate that contributory payments were contemplated at the outset or formed any part of a contract or bargain. Non constat with regard to each of those

1936

NEWELL
v.
CROSS,
COOK,
PLUME,
CHENERY.

Lord Hewart
C.J.

payments that it was not both subsequent and voluntary, and as for the expression "each of the others still owed her that sum," I do not think that that expression should be pressed too far. It may well be the result of an innocent leading question, and point rather to an expectation based on what was thought to be fitting rather than to a claim based on a bargain. I think that the matter is left so vague on the crucial point by the facts in the case that the justices were entitled in Mrs. Plume's case to find that before starting from Ipswich, whatever may have happened subsequently and perhaps by way of afterthought, no contributions were asked for or received by her from the other passengers in the taxicab. In my opinion, therefore, this appeal ought to be dismissed, and also the case of Chenery, the last in the list.

Chenery was the taxicab driver who drove Mrs. Plume and her party. The justices have found that he did not know, and had no reason to know, that any part of the fare of 14*s*. was or would be paid by any of the other passengers. I cannot disengage from the facts in that case anything which can clearly be said to have put the respondent on inquiry. I cannot say that it can be put as a matter of law that, on the facts disclosed, the only possible inference was that he knew or ought to have known. I am not therefore prepared to say that in coming to their conclusion the justices were wrong. In those circumstances that appeal also should be dismissed. The result is that in these four cases the appeal in the first case on its special facts should be allowed and in each of the remaining cases the appeal should be dismissed.

I should like to add one word on the methods observed in these cases. It is quite apparent that if it had not been for the admission extracted by some official by questioning persons or a person in the taxicabs the prosecution would have had no materials on which to proceed. It does not appear that any kind of warning is administered to persons who are interrogated in that fashion. I should have thought that the fair thing was to give a warning.

DU PARCQ J. I agree with all that has been said by my

Lord and my only reason for adding anything to it is because, in my opinion, these cases, trivial in some respects, are of importance to the public. I agree that the Court is not concerned with the question whether an Act of Parliament is expressed in terms which are too wide and may lead to results repugnant to common sense. I fully realize that the last thing which a Court ought to think of doing is to try in effect to alter the law by finding some ingenious means of escape from its clear provisions. Indeed, if it ever does happen, and I am not saying that it has happened in this case, that Parliament, owing to the difficulty of drafting a law of general application, has spread the net too wide and has done something which on more mature deliberation it would say that it had not intended to do, the best way of pointing out any such defect in an Act is that it should be rigidly enforced by the Courts. The worst way of dealing with legislation of that kind is that any authority or any judge should give sanction to the view that laws which the public do not like ought to be disregarded or improperly evaded.

It may seem to many people surprising that, as has been said at the Bar, if two or more people hire a taxicab, arranging between themselves in advance that each shall contribute to the fare, each of them is committing a criminal offence. It may be that a great many people have committed that offence without knowing it. I should imagine that it is quite possible that it will come as a great surprise to Miss Cross to know that she has done something which should be described as a criminal offence. I agree with my Lord that it is open to justices to say that an offence is of such character that it may be dealt with in the most lenient possible way, even without recording a conviction, but that is a matter entirely for the justices. So far as Miss Cross is concerned I agree that the Court is bound to hold that an offence has been committed. So far as the two drivers are concerned, I have nothing to add to what has been said by my Lord. With regard both to those cases and to that of Mrs. Plume, it is hardly perhaps necessary to say, as may be said of all cases which come before us in this way, that we are bound by what purport

1936

NEWELL
v.
CROSS,
COOK,
PLUME,
CHENERY.

du Parcq J.

to be findings of fact unless it is plain from the special case that they are inconsistent with facts proved or admitted. Sometimes what is called a finding of fact is really an inference from other facts which cannot in law or in logic properly be drawn. In Mrs. Plume's case, which is the only one presenting any difficulty, I am of opinion, looking at the findings of fact as a whole, that the justices were not satisfied that there was any agreement between Mrs. Plume and her fellow passengers before the journey started. If there was no such agreement, express or implied, and she was herself solely responsible for the payment of the fare, none of her fellow passengers being bound by contract to contribute a share, then she would not be guilty of unlawfully causing a vehicle to be used as an express carriage. In her case, therefore, the appeal ought, in my opinion, to be dismissed.

GODDARD J. I agree. I only wish to refer to the last part of the judgment of the Lord Chief Justice because of the facts which I find stated in the case of Mrs. Plume. Parliament has laid down in the Road Traffic Act, 1930, certain matters on which police-constables or officials may require information. It has imposed obligations on persons to give information on certain occasions. I can find no provision which authorizes or entitles a police-constable or traffic examiner to cross-examine passengers who may be riding in a taxicab, and no provision which requires those passengers to give any answers. I am sure that if I had been a passenger in a taxicab in similar circumstances and had been cross-examined in this way I should, I hope politely, but with considerable emphasis, have declined to answer. It seems to me most desirable that if police-constables or traffic examiners or any other officials are going to cross-examine people in this way, and indeed make suggestions to them with regard to the answers, or for the purpose of getting admissions, they should in common fairness give the caution which a police-constable has to give now in any other criminal offence. I hope that justices will see that that is carried out in future, and, when a proper caution has not been given,

1936

NEWELL
v.
CROSS,
COOK,
PLUME,
CHENERY.

will refuse to admit evidence obtained in the way in which the evidence has obviously been obtained in this case.

Appeal allowed in Newell v. *Cross: Appeal dismissed in the other cases.*

Solicitor: *The Treasury Solicitor.*

J. W. H.

REED *v.* CATTERMOLE (INSPECTOR OF TAXES).

1936
May 25, 26.

Revenue—Income Tax—Sch. E—Minister of Methodist Church—Required residence in manse—Payment of Sch. A tax and rates by employers on his behalf—Emoluments of office.

A minister of the Methodist Church, appointed minister of a circuit containing nine churches, resided in a manse provided, furnished, decorated and repaired by his employers, the Church, which manse was not part of larger premises belonging to the Church. It was a requirement of his appointment that he should reside in the manse in order to the better performance of his duties, and he was not allowed to sublet it or make any profit from his occupation.

Sch. A tax, rates and water rate in respect of the manse were paid on his behalf by the Church:—

Held, that the amount of such tax and rates did not form part of the emoluments of his office in respect of which he could be taxed under Sch. E.

Tennant v. *Smith* [1892] A. C. 150 and *Inland Revenue* v. *Miller* [1930] A. C. 222, distinguished.

CASE stated under the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 26, 1935, the appellant, the Rev. Joseph Reed, appealed against an assessment to income tax made upon him under Sch. E to the Income Tax Acts in respect of his office as a minister of the Methodist Church for the year 1934–35, on the ground that there had been included therein a sum equal to the local rates, water rate and income tax under Sch. A paid in respect of the manse in which he resided in the circumstances below mentioned. The sole question for the consideration of the Court was whether the said sum, being the Sch. A tax of the said manse together with local rates and water rate thereon, formed part of the appellant's emoluments of office as a minister of the Methodist Church for the purposes of the said assessment to income tax. The Sch. A assessment book showed the appellant as occupier and the Wesleyan Methodist Church as owner of "Westerley," Crossland Road, Redhill, the house in question. The contents of the assessment book were not known to the appellant.

In September, 1930, the appellant was appointed by the Wesleyan Methodist Conference to be minister of the Wesleyan Methodist circuit of Redhill, Surrey. The circuit comprised two churches at Redhill, two at Reigate and one each at Meadvale, Earlswood, Bletchingley, South Merstham and Horley. His said appointment involved that he should go and reside at the said house or manse, which was provided for the minister of the Redhill circuit. This he did, though the house was in fact too large for his needs. The Wesleyan Methodist Church is now merged into the Methodist Church. The general control of the Methodist churches is vested in the Annual Methodist Conference. The Conference consists of certain ex-officio members and of the elected representatives of districts which are divided into circuits.

Each circuit may consist of any number of churches and acts through a representative committee called the quarterly meeting, which appoints at least two administrative lay agents called circuit stewards. These officers are responsible for seeing that the financial needs of the circuit are met. The circuit acting through its quarterly meeting provides the minister's stipend and buys, takes on lease, or otherwise provides a manse from which the minister appointed to the circuit carries on his work, which consists of preaching, pastoral work and administration. A minister is not allowed to sublet the manse he occupies nor to make any profit out of his occupation, and the cost of furnishing, decoration and repairs is borne by the circuit. In the present case the Sch. A tax, the rates and the water rate were defrayed by the circuit stewards out of moneys provided by the quarterly meeting out of contributions from the churches in the circuit.

It is a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit whether it is suitable for him or not, in order that he may perform his duties. The average stipend is less than 300*l.* per annum, so that only in an exceptional case could a married minister afford to live elsewhere than in the manse provided. It is usual for a minister to remain on a circuit for not less than three years and not more than six. The circuit has no power of appointment or dismissal, but the appointment may be terminated by the Conference at any time without previous notice.

On behalf of the appellant it was contended (1.) that his occupation of the manse was representative and not beneficial and that the sum representing Sch. A tax in respect of the said manse together with water rate and local rates thereon should be excluded from the assessment; (2.) that the appellant at no time had notice that he was assessed to tax under Sch. A, and that in any event an assessment under the schedule was conclusive only as to the amount of the assessment.

It was contended on behalf of the respondent (1.) that the fact that the minister was assessed to Sch. A tax on the manse, and was not able to pass on the burden of tax by deduction against any other person, was conclusive in favour of the respondent so far as the Sch. A tax was concerned; (2.) alternatively that the minister in fact enjoyed the beneficial occupation of the manse; (3.) that the tax under Sch. A, the rates and water rate were exigible from the minister personally as the occupier of the manse, and these payments having been defrayed by the circuit stewards formed part of the emoluments of his office; (4.) that the assessment was correct in principle and should be confirmed, subject to an agreed minor adjustment of figures.

The Commissioners held that the appellant's occupation of the manse was beneficial and that the said sum equal to the

Sch. A tax, together with the amounts representing water rate and local rates thereon, formed part of his emoluments of office for the purposes of income tax assessable upon him under Sch. E.

The appellant in due course required the Commissioners to state this case for the opinion of the High Court.

Cyril King for the appellant.

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondent.

Lawrence J. This is a difficult case, because it requires a distinction to be made between two cases in the House of Lords and a number of other cases. The question is whether the appellant, the Rev. Joseph Reed, is liable to be assessed under Sch. E in respect of the tax under Sch. A upon the house in which he resides as a manse for the purposes of his ministry, and the rates and water rate on that house.

The appellant is a minister of the Methodist Church. The facts are somewhat obscure with reference to the assessment to tax under Sch. A, but the facts generally as to his residence in his house are stated in the case. It appears from them that his appointment involved that he should go and reside at this house, which was provided for the minister of what is called the Redhill circuit, and he had to go there although it was in fact too large for his needs. The Methodist Church is governed by the Annual Methodist Conference, and under the Annual Methodist Conference there are district circuits. There are circuit stewards appointed by these circuits to carry out the administrative work of the Church, and those circuit stewards are responsible for the financial needs of the circuit. The circuit acts through its quarterly meeting and provides the minister's stipend and, according to the case, buys or otherwise acquires a manse from which he carries on his work, such as preaching, and part of the work of administration. He is not allowed to sublet it or to make any profit out of it. It is furnished by the circuit, decorated by them, repaired by them, and in fact the Sch. A tax is paid by them or else repaid to the minister. The case states that it is a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit, whether it is suitable for him or not, in order that he may perform his duties. The circuit have no power of appointment of the minister, his appointment and his dismissal or removal being in the hands of the Conference, and he can be removed by the Conference without notice of any sort.

As regards the actual assessment to Sch. A, the appellant was entered in the assessment book as occupier, and the Wesleyan Methodist Church as owner, of this house. But he was unaware of the terms of the assessment book and the receipt for the payment. The receipt for the payment of the tax states the name of the person assessed, or occupier under Sch. A, as the Redhill Methodist Circuit, and the receipt was for the sum of 6*l.* 7*s.* 6*d.* from Mr. G. Pelham. In the contention of the appellant, it is said that the appellant at no time had notice that he was assessed to tax under Sch. A.

In these circumstances it was contended at first that these facts amounted to an assessment to Sch. A upon the appellant, and that as he had not appealed, a legal liability was created upon him in respect of that tax, and that as the circuit had actually paid the amount of the tax to him, or rather, to the income tax authorities, and in that way had relieved him in respect of the tax, the matter fell within the principle of the case of *Hartland* v. *Diggines*. (1) At a later stage, in view of the way in which the facts had been proved before the Commissioners, that point was waived by counsel for the Crown, and I therefore express no opinion upon it.

The other two points which have been argued before me are (1.) that the question whether the appellant is taxable under Sch. E in respect of his occupation of the manse is a question of fact upon which I am bound by the decision of the Commissioners, and (2.) that apart from the finding of the Commissioners he was in beneficial occupation of the manse and that that is therefore an emolument within the meaning of Sch. E.

I am not prepared to take what would be the simple course of deciding that this case is a question of fact. The matter was stated, it seems to me, by way of a contention of law, that the residence of the appellant in this house did not constitute beneficial occupation, but, so far as it was occupation at all, was representative of the circuit or the Conference or the Church. Apart from it being raised as a matter of law in that way, I am of opinion that upon the facts as stated by the Commissioners there was no evidence upon which they could decide that the appellant had a beneficial occupation in the manse. The Attorney-General's argument, which was continued by Mr. Hills, was first of all that it was a question of fact. Then, apart from that, they drew my attention to the cases which they said were on either side of the line. They said that every one would agree that if an employee was asked by his employer to find a house in a particular locality, and the employer then bought or leased a house for him, the occupation of that house would be considered to be the occupation of the employee; but that, taking the other side of the line, the occupation of a policeman who occupies part of the police premises would not be beneficial occupation. They said that the fact that the employee was required to reside in the particular house made no difference, that the essential test for the purpose of deciding whether the occupation was a beneficial occupation of the employee or remained the occupation of the employer, was that the premises in question must be part of the premises of the employer.

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(1) [1926] A. C. 289; 10 Tax Cas. 247.

My attention was called by counsel for the appellant to a number of cases, some of which are rating cases and one of which is an income tax case, where occupation for the purposes of rating and income tax is distinguished according to whether it is what may be called representative occupation or beneficial occupation; or, in other words, whether the person who resides in the house is to be considered as residing there as a tenant or as a servant. One of the best passages in which the point is considered is in the case of *Dobson* v. *Jones*. (1) The case was dealing with the rateability of a naval surgeon at Greenwich Hospital. Tindal C.J., delivering the judgment

(1) (1844) 5 Man. & G. 112.

of the Court, referring to the previous case of *Hughes* v. *Chatham Overseers* (1), said (2): "Upon that occasion, we declared our opinion to be that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might, if such residence had not been allowed to them, have had an additional allowance for lodging-money; whilst at the same time, we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant: upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely whose possession and occupation is strictly and properly that of their masters." Then he goes on to decide that the occupation of the naval surgeon was as servant and not as tenant, and the headnote is "inasmuch as he was *required* to occupy the same with a view to the more efficient performance of his duties as surgeon."

Another case on this line to which my attention was drawn was *Bent* v. *Roberts* (3), an income tax case. The headnote in the report in Tax Cases (3) is: "A police constable, compelled by the police authorities to live in a house having a communication with a police station by a doorway between the two yards, the residence there of the constable being necessary for police purposes, and the constable being liable to removal to another station at any time, not an occupier within the meaning of the Acts."

Before stating the contention of the Attorney-General, I ought to refer to the case of *Smith* v. *Seghill* (4), which was the case of a collier who was held to occupy as a tenant, on the ground that he was not compelled to live in a house which was

(1) (1843) 5 Man. & G. 54.
(2) Ibid. 120.
(3) (1877) 3 Ex. D. 66; 1 Tax Cas. 199.
(4) (1875) L. R. 10 Q. B. 422.

1936

REED
v.
CATTERMOLE.

Lawrence J.

provided, although he could if there was one available. That group of cases was relied upon by the appellant as showing that where the residence of the person sought to be rated or taxed in the house in question is for the interest of the employer and for the more effectual performance of the service required from such person, and the latter is required to live in that particular house, there the occupation is the occupation of the master and not of the servant.

The Attorney-General distinguished all these cases by saying that they were cases where the house occupied was part of the premises of the employer, and also in the case of the policeman (1) that the policeman sometimes actually used the house for the purposes of his duty, such as bringing prisoners there, and in the case of the naval surgeon (2) that it was an essential part of his duties that he should be in Greenwich Hospital, and that when he was not there somebody else should be there in his place. Similarly, in the case of *Tennant* v. *Smith* (3), where the bank agent of a Scottish bank lived in the premises of the bank, he was required to live there and his presence there was necessary for the purposes of his duty.

The Attorney-General insisted that in all those cases the essential fact was not that the man should be required to live there, but that the premises where he was required to live should be part of the employer's other premises which were used for the purposes of the office of the resident.

In *Tennant* v. *Smith* (3) Lord Halsbury put the case largely upon the fact that the bank agent could not turn the premises to any profit ; but Lord Watson put the case on the other ground. He said (4) : " The appellant is not a proprietor, neither is he an occupier within the meaning of Sch. B. The bank are the only occupiers, being, as Lord Herschell said in *Russell* v. *Town and County Bank* (5), ' in . . . . the same position as if that portion of their bank premises were used in any other way in the strictest sense for the purposes of the bank and the business of the bank.' The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwelling-house or business premises instead of occupying a separate residence of his own."

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(1) (1877) 3 Ex. D. 66 ; 1 Tax Cas. 199.
(2) 5 Man. & G. 112.
(3) [1892] A. C. 150 ; 3 Tax Cas. 158.
(4) [1892] A. C. 158 ; 3 Tax Cas. 166.
(5) (1888) 13 App. Cas. 418, 426.

Lord Macnaghten says (1): "From the case stated for the opinion of the Court of Exchequer in Scotland it appears that 'the appellant is bound, as part of his duty, to occupy the bank house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours.' He is not entitled to sub-let the bank house or to use it for other than bank business, and in the event of his ceasing to hold his office he is under obligation to quit the premises forthwith. Property, therefore, in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear, therefore, that the appellant is not chargeable under Sch. A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay."

Lord Hannen uses expressions of a similar sort (2), and refers to the apt illustration of Lord Young, "of the master of a ship who is spared the cost of house rent while afloat." Lord Young had pointed out (3) that, although he was spared the cost of a house, that did not render him the beneficial occupier of the cabin.

The Attorney-General insists upon the fact that in all those cases the premises occupied were part of the premises of the employer. But, in my judgment, that was not the true ratio decidendi. I think that all the cases were really decided upon the view expressed by Tindal C.J. in the case of *Dobson* v. *Jones* (1) that the residence was for the interest of the employer and for the more effectual performance of the service required from the officer. If the circumstances of the particular office did not require that the officer should live in premises which were part of the premises which he used for his office—for instance, to take the case of a minister, where the residence does not immediately adjoin a church—it may still be for the interest of the employer and not for the remuneration of the employee, and for the more effectual performance of the service of the latter, that he should live in a house which is not contiguous to the particular church. Of course, in the circumstances of this particular office it is clear why that is so: because the appellant has to minister at a number of churches, and his house is placed in some convenient position with reference to all the churches at which he has to minister.

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(1) [1892] A. C. 162; 3 Tax Cas. 169.
(2) [1892] A. C. 165; 3 Tax Cas. 171.
(3) 18 R. 428, 436.

I am therefore of opinion that the test suggested by the Attorney-General is not the true test. He also contended that the case of *Inland Revenue* v. *Miller* (2) and other cases of that sort, namely, *Lord Tollemache* v. *Inland Revenue* (3); *Sutton* v. *Inland Revenue* (4); and *Nicoll* v. *Austin* (5), govern the present case and ought to be followed in preference to *Tennant* v. *Smith*. (6)

That contention is based, I think, principally upon the observations in *Lady Miller's* case (2) as to the erroneous nature of the decision or of the reasoning in the cases of *M'Dougall* v. *Sutherland* (7) and *Corke* v. *Fry*. (8) In *M'Dougall* v. *Sutherland* (7) the Court of Session had decided that a Free Church minister was not taxable in respect of his manse, and the ratio decidendi of that case was, in my opinion, that he was not taxable because he could not let and therefore could not turn the manse to profit. That ratio decidendi was expressly dissented from by all the learned Lords who decided

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(1) 5 Man. & G. 121.

(2) [1930] A. C. 222; 15 Tax Cas. 25.

(3) (1926) 11 Tax Cas. 277.

(4) (1929) 14 Tax Cas. 662.

(5) (1935) 19 Tax Cas. 531.

(6) [1892] A. C. 150; 3 Tax Cas. 158.

(7) (1894) 3 Tax Cas. 261; 21 R. 753.

(8) (1895) 3 Tax Cas. 335; 22 R. 422.

Lady Miller's case. (1) In the case of *Corke* v. *Fry* (2) the minister was a minister of the Established Church, and the church there was not vested in any trustees. In the case of *M'Dougall* v. *Sutherland* (3) it was vested in trustees. In *Corke* v. *Fry* (2) the Court held that the minister was assessable under Sch. A in respect of the manse, but they put their decision upon the fact that he could turn the manse into money by letting it. Mr. King, for the appellant, contended that in *M'Dougall* v. *Sutherland* (3) there was no express requirement that the Free Church minister should live at the manse, and it does not appear that there was; but Lord Adam, in dealing with the case, treats it as though there was. I do not distinguish it on that ground.

Coming now to *Lady Miller's* case (1) that was quite a different case from the cases which deal with ministers of religion. It was the case of the widow of a gentleman who had left property to trustees upon trust that his widow might occupy one of his houses rent free and tax free. It was contended on behalf of the widow that because she could not let the house under the terms of the will, therefore she had no beneficial occupation. The House of Lords held that that was not the true view, and for that reason, in my opinion, they expressed their disapproval of *M'Dougall* v. *Sutherland* (3) and the reasoning in *Corke* v. *Fry*. (2) Lord Buckmaster put on one side, in my view, such cases as I have here to consider, when he said this (4): "Her occupation"—that is Lady Miller's occupation—"was in her own right and she was not occupying as the representative of the trustees." Then he deals with *Tennant* v. *Smith* (5) and he quotes with approval the speeches which I have already read of Lord Watson and Lord Macnaghten, and says (6): "It is unnecessary to investigate this decision further, but it is well to add that, in referring to phrases used by the other members of your Lordships' House who heard the case, such as those relating to the

(1) [1930] A. C. 222; 15 Tax Cas. 25.

(2) 3 Tax Cas. 335; 22 R. 422.

(3) 3 Tax Cas. 261; 21 R. 753.

(4) [1930] A. C. 229; 15 Tax Cas. 77.

(5) [1892] A. C. 150; 3 Tax Cas. 158.

(6) [1930] A. C. 232; 15 Tax Cas. 80.

1936
REED
v.
CATTERMOLE.
Lawrence J.

inability of the agent to make a profit out of his occupancy, these phrases must all be read in relation to the central facts and features of the case to which I have referred. To my mind, therefore, this case in no way governs the present." So that having clearly distinguished *Lady Miller's* case (1) from *Tennant* v. *Smith* (2) by saying that her occupation was in her own right under the will and not as representative of the trustees, and then having gone on to refer to the passages in Lord Watson's and Lord Macnaghten's judgments where they point out that the occupation of the bank agent in that case was representative and was not his own right, he then goes on to dispose of the other ratio in *Tennant* v. *Smith* (2)—namely, that the bank agent could not make any profit out of the premises by letting them. He says (3) that *Corke* v. *Fry* (4) "was right in the result but wrong so far as it made the power to let the rigid exclusive test of liability. The case of *M'Dougall* (*or Inland Revenue*) v. *Sutherland* (5) was wrongly decided." In my view, what he meant to say was that the case of *Inland Revenue* v. *Sutherland* (5) was wrongly decided upon the ground upon which it was decided.

Lord Dunedin said (6): "I have already said that I think the Free Church manse case (5) ill decided. I think the same of the *Wemyss Case*. (7)" The *Wemyss Case* (7) was a very similar case to the *Lady Miller* case (1), decided by the Court of Session in the opposite way to the way in which the House of Lords decided it. "The *Bank Case* (8), which was in this House and therefore is binding on me, has, I think, been only misunderstood. The whole point was that it was found as a fact that the occupation of the bank by the agent was not truly his occupation, but the bank's occupation and the tax due under Sch. A was no more leviable on the agent than it would have been on a caretaker who lived on the premises to keep them clean."

(1) [1930] A. C. 222; 15 Tax Cas. 25.

(2) [1892] A. C. 150; 3 Tax Cas. 158.

(3) [1930] A. C. 233; 15 Tax Cas. 81.

(4) 3 Tax Cas. 335; 22 R. 422.

(5) 3 Tax Cas. 261; 21 R. 753.

(6) [1930] A. C. 236; 15 Tax Cas. 83.

(7) *Inland Revenue* v. *Wemyss* 1924 S. C. 284; 8 Tax Cas. 551.

(8) [1892] A. C. 150; 3 Tax Cas. 158.

Lord Warrington said (1): "The question there"—that is in the case of *Tennant* v. *Smith* (2)—"was whether the income from all sources of a servant of a bank includes as part of his emoluments under Sch. E the annual value of a portion of the bank premises in which as a servant of the bank he was required to reside. The bank itself was assessed in respect of the whole of the premises under Sch. A and paid the tax. It was held that nothing in respect of the annual value of the portion occupied by him of the bank premises could be treated as income under Sch. E. This case had nothing to do with Sch. A, and in addressing this House Lord Macnaghten recognized that income from all sources includes the annual value under Sch. A, and the annual value chargeable under Sch. B. This case is no authority in support of the respondent's case."

Of course, in the present case I am impliedly holding and am of opinion that the appellant was not properly assessed if he was assessed under Sch. A. *Miller's* case (3) appears to me to be entirely different from the case of *Tennant* v. *Smith* (2) and from the present case, and so do the other cases to which Mr. Hills referred me. In *Tollemache's* case (4) trustees under a will were by the will to keep the mansion for the successor of the testator and to keep it, allowing the then Lord Tollemache to occupy under the will. It is clear, in my view, that in that case Lord Tollemache was beneficially entitled, the bare legal estate being in the trustees, and Rowlatt J. in that case expressly distinguishes it from the class of case with which I consider I am dealing. He said (5) "In three Scottish cases, *Tennant* v. *Smith* (2), the Free Church minister's case (6), and the Established Church minister's case (7), the question was whether the subject's occupation was not merely the occupation of which a familiar example is the servant's occupation; that is to say, there was no occupation at all; that it was the employer's house, and that the servant lived in it, but the house remained in the occupation of, and every conceivable interest in the house

(1) [1930] A. C. 239; 15 Tax Cas. 85.

(2) [1892] A. C. 150; 3 Tax Cas. 158.

(3) [1930] A. C. 222; 15 Tax Cas. 25.

(4) 11 Tax Cas. 277.

(5) Ibid. 286.

(6) 3 Tax Cas. 261; 21 R. 753.

(7) 3 Tax Cas. 335; 22 R. 422.

1936

REED
v.
CATTERMOLE.

Lawrence J.

remained in, the master, and that the servant merely had it put at his disposal, as a gardener or a chauffeur may be given quarters by his employer. Under those circumstances, although it is very nice to have, in addition to your salary, a place of residence provided for you, which saves your pocket, as Lord Macnaghten pointed out, what the income tax hits is not what is saved your pocket, but what goes into your pocket." That was a distinction between the class of cases with which I have to deal here and the class of cases which was being dealt with in *Miller's* case (1) and *Tollemache's* case (2) and *Sutton's* case. (3) The other case of *Nicoll* v. *Austin* (4) was a case where the occupation was under a will or a trust. A company paid its managing director for the upkeep of his own house because they wanted him to continue in it, presumably for the purposes of the general reputation of the company. There it was his own house, he was proprietor of the house, he always lived in it, and that, in my view, is clearly distinguishable from the present case.

In view of the actual facts, therefore, found in this case, and applying the principle which I understand the cases to have laid down, having regard to the fact that the appellant was required to reside in this particular house to carry on his work therefrom, that the house was furnished by the circuit and decorated by the circuit, that it was a strict requirement that the minister should live in the house in order that he might perform his duty, and the fact that he might be turned out of the house without a moment's notice by the Conference, it appears to me that there was no evidence upon which the Commissioners could properly find that the appellant had the beneficial occupation of this house. I therefore am of opinion that this appeal ought to be allowed with costs.

Solicitors for appellant: *Butt & Bowyer.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1930] A. C. 222; 15 Tax Cas. 25.
(2) 11 Tax Cas. 277.
(3) 14 Tax Cas. 662.
(4) 19 Tax Cas. 531.

W. L. L. B.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1936.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1 1936, will be as follows :—

In the First Series,
[1936] 1 Ch.

In the Second Series,
[1936] 1 K. B. [1936] 2 K. B. [1936] P.

In the Third Series,
[1936] A. C.

INDEX.

ACCEPTANCE—Of bill of exchange—Signature obtained by fraud—Acceptor's name inserted as addressee without his knowledge—Material alteration—Liability of acceptor to bona fide holder 101
See BILL OF EXCHANGE.

ACCIDENT—To person.
See PERSONAL INJURY.

ACTION—By each of two plaintiffs separately against same defendant — Consolidation—Payments into Court—Order as to costs - - - 550
See COSTS.

—— By owner of copyright for alleged infringement — Premature commencement of - - - 176
See COPYRIGHT.

—— By passenger against owner of lorry for personal injuries by negligence—Application by defendant for security for costs or transfer to county court—Discretion of Judge
See PRACTICE. 215

—— By servant against employer company —For wages illegally paid in shares of company—Counterclaim by company for price of shares - 193
See MASTER AND SERVANT.

—— By third party against insurer—On judgment against insured—Previous cancellation of policy—Effect 253
See INSURANCE (MOTOR) **3**.

—— Interpleader issue between husband and wife, whether an - - 164
See HUSBAND AND WIFE.

ADJOINING LANDOWNERS — Noise maliciously caused by one to injure the other - - - - - 468
See NUISANCE.

ADMIRALTY—Contract with shipowner for use of tug—Payment under by shipowner for collision damage caused by tug—Liability of underwriter of policy on ship - - 461
See INSURANCE (MARINE) **2**.

ADVERSE COMMENT—By agent of defendant on pending action—Liability to attachment of defendant and agent
See CONTEMPT OF COURT. 595

ADVERTISEMENT — Of place used for public entertainment on Lord's Day—Penalty - - - 477
See SUNDAY OBSERVANCE.

AGENT.
See PRINCIPAL AND AGENT.

AGREEMENT.
See CONTRACT.

AGRICULTURAL SOCIETY—Annual show—Profits—Income tax—Exemption
See REVENUE **6**. 497

ALLOWANCE—Income tax.
See PERSONAL ALLOWANCE.

ALTERATION.
See MATERIAL ALTERATION.

AMENDMENT—Of valuation list—Proposal for—Objection to by rating authority before assessment committee — Appointment of officer of rating authority as clerk to assessment committee—Validity - - 626
See RATING **3**.

APPEAL—From county court to High Court—Against order for tithe rentcharge—Usual remedy - 416
See ECCLESIASTICAL LAW.

APPOINTMENT — Of officer of rating authority as clerk to assessment committee—After objection by rating authority to proposal to vary valuation list—Validity - **626**
See Rating **3**.

APPORTIONMENT OF PAYMENTS — *Intention of party making payment uncommunicated to other party—Two debts owed by husband to wife—Payment of money to wife—Intention of husband to appropriate it to one debt—Intention uncommunicated to wife—Right of wife to appropriate payment to other debt.*
Leeson *v.* Leeson - - **C. A. 156**

ASSAULT—On police officer—Whether committed while in execution of duty—Officer remaining on private premises after direction to leave - **434**
See Police.

ASSESSMENT—To income tax.
See Revenue **1**—**9**.

—— To rates.
See Rating.

—— To Sur-tax.
See Revenue **7**—**9**.

—— To taxes.
See Revenue.

ASSESSMENT COMMITTEE — Clerk of — Groundless suggestion of possible bias—Validity of appointment **626**
See Rating **3**.

ATTACHMENT OF DEBT—*Garnishee order—Banker—Solicitor's accounts—Client account—Debt owing from banker to solicitor—Cheque dishonoured after service of garnishee order nisi—"Refer to drawer" written on cheque—Claim for libel—Solicitors Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 24), *ss.* 1, 8—*Solicitors' Accounts Rules*, 1935, *dated June* 8, 1934 (*S. R. & O.*, 1934, *No.* 718/*L.* 18)—*R. S. C.*, *Order* xlv., *r.* 2.
Plunkett and Another *v.* Barclays Bank Ld. - - - **du Parcq J. 107**

ATTACHMENT OF PERSON—Applications for against defendants and their agent—For publication of matter adverse to pending action - **595**
See Contempt of Court.

AUDIENCE—Right to in county court—Of landowner failing to give notice of opposition to claim for tithe rentcharge - - - - **416**
See Ecclesiastical Law.

AVOIDANCE—Of sur-tax—"Exceptional and not systematic" - - - - **542**
See Revenue **7**.

BANKER—Debt owing from to solicitor—Client account—Garnishee order on bank in respect of debt—Cheque drawn by solicitor on client account marked "refer to drawer"—Claim for libel - - - - - **107**
See Attachment of Debt.

—— Loan by—Interest debited by banker to loan account—Right of borrower to recover income tax on interest **59**
See Revenue **3**.

BENEFICIAL USE—Of unoccupied land—Liability of person entitled to for income tax - - - - **521**
See Revenue **1**.

BIAS—In clerk of assessment committee—Groundless suggestion of—Validity of appointment - - - **626**
See Rating **3**.

BILL OF EXCHANGE—*Document with no addressee or drawee—Subsequent insertion and alteration—Acceptance obtained by fraud—Alteration with consent of drawer but without the knowledge of acceptor—Acceptor's name inserted as addressee without his knowledge—Material alteration—Validity of document as promissory note—Liability of acceptor to bona fide holder for value without notice—Bills of Exchange Act*, 1882 (45 *&* 46 *Vict.* *c.* 61), *ss.* 6, *sub-s.* 1; 20, *sub-s.* 1; 64, *sub-s.* 1.
Haseldine *v.* Winstanley
Horridge J. 101

BUILDER—Sale of house by—No duty to purchaser or occupant to take care that house well built - - **46**
See Negligence **2**.

BURDEN OF PROOF—As to decontrol of house from rent restriction - **6**
See Landlord and Tenant **2**.

BUSINESS—Of employer—Prohibited act of injured workman, whether done for purpose of - - - - **330**
See Workmen's Compensation **2**.

CANCELLATION—Of policy and certificate of insurance against third-party risks—Effect - - - **253**
See Insurance (Motor) **3**.

CARGO—Insurance for full value at date of policy—Subsequent increased value policy with other insurers—Total loss—Both policies paid in full—Salvage—Original insurers entitled to whole amount - - - **121**
See Insurance (Marine) **1**.

CASES:—

—— *Admiralty Commrs. v. s.s. Amerika* [1917] A. C. 38, 60.
Observations of Lord Sumner referred to. Furness Withy & Co. *v.* Duder. **Branson J. 461**

CASES—*continued.*

—— *Allen v. Flood* [1898] A. C. 1
Distinguished. HOLLYWOOD SILVER FOX FARM, LD., *v.* EMMETT. **Macnaghten J. 468**

—— *Allison, Johnson & Foster, Ld., In re; Birkenshaw, Ex parte* [1904] 2 K. B. 327, 330.
Dictum questioned. CRAVEN-ELLIS *v.* CANONS, LD. - - **C. A. 403**

—— *Ashton Gas Co.* v. *Attorney-General* [1906] A. C. 10.
Followed. COMMISSIONERS OF INLAND REVENUE *v.* PEARSON **Lawrence J. 533**

—— *Back* v. *Daniels* [1925] 1 K. B. 526.
Dictum considered. BERTRAM *v.* WIGHTMAN - - **Lawrence J. 521**

—— *Berkshire County Council* v. *Reading Borough Council* [1921] 2 K. B. 787.
Followed. LONDON COUNTY COUNCIL *v.* CAMBRIDGESHIRE COUNTY COUNCIL **Div. Ct. 298**

—— *Birkenshaw, Ex parte; Allison, Johnson & Foster, Ld., In re.*
Dictum questioned. CRAVEN-ELLIS *v.* CANONS, LD. - - **C. A. 403**

—— *Bottomley* v. *Bannister* [1932] 1 K. B. 458.
Followed. OTTO *v.* BOLTON AND NORRIS - - **Atkinson J. 46**

—— *Bowden* v. *Russell* (1877) 46 L. J. (Ch.) 414.
Referred to. GASKELL & CHAMBERS, LD. *v.* HUDSON, DODSWORTH & CO. **Div. Ct. 595**

—— *Bradford Corporation* v. *Pickles* [1895] A. C. 587.
Distinguished. HOLLYWOOD SILVER FOX FARM, LD. *v.* EMMETT **Macnaghten J. 468**

—— *Bradford-on-Avon Union* v. *White* [1898] 2 Q. B. 630.
Discussed and followed. ROBINSON BROTHERS (BREWERS), LD. *v.* HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE **Div. Ct. 283**

—— *Brooke* v. *Price* [1917] A. C. 115.
Applied. COUNTESS OF SHREWSBURY *v.* COMMISSIONERS OF INLAND REVENUE - - **Lawrence J. 582**

—— *Clements* v. *Ward. In re Smith's Estate* (1887) 35 Ch. D. 589, 595.
Statement of principle by Stirling J. approved and followed. REX *v.* MINISTER OF HEALTH. *Ex parte* VILLIERS - - - **Div. Ct. 29**

CASES—*continued.*

—— *Croxford* v. *Universal Insurance Co., Ld.* [1935] 2 K. B. 409.
Reversed - - - **C. A. 253**

—— *Donoghue* v. *Stevenson* [1932] A. C. 562.
Explained. OTTO *v.* BOLTON AND NORRIS - - **Atkinson J. 46**

—— *Evans* v. *Baxter* (1930) 46 Times L. R. 270.
Distinguished. STROOD ESTATES CO., LD. *v.* GREGORY - **C. A. 605**

—— *Flach* v. *London & South Western Bank, Ld.* (1915) 31 Times L. R. 334, 336.
Dicta adopted. PLUNKETT AND ANOTHER *v.* BARCLAYS BANK LD. **du Parcq J. 107**

—— *Forster* v. *Baker* [1910] 2 K. B. 636, 638.
Observations adopted and applied. GREEN *v.* BERLINER **du Parcq J. 477**

—— *Gaunt* v. *Fynney* (1872) L. R. 8 Ch. 8.
Applied. HOLLYWOOD SILVER FOX FARM, LD. *v.* EMMETT **Macnaghten J. 468**

—— *Great Central Ry. Co.* v. *Bates* [1921] 3 K. B. 578.
Applied and explained. DAVIS *v.* LISLE - - - **Div. Ct. 434**

—— *Hill* v. *Gregory* [1912] 2 K. B. 61.
Distinguished. BERTRAM *v.* WIGHTMAN - - - **Lawrence J. 521**

—— *Hillyer* v. *Governors of St. Bartholomew's Hospital* [1909] 2 K. B. 820.
Applied. STRANGWAYS-LESMERE *v.* CLAYTON - - **Horridge J. 11, 151**

—— *Hirachand Punamchand* v. *Temple* [1911] 2 K. B. 330.
Distinguished. MORLEY *v.* MOORE **C. A. 359**

—— *Hodgkinson* v. *Hewitt* (1928) 139 L. T. 401; 44 Times L. R. 694.
Distinguished. STROOD ESTATES CO., LD. *v.* GREGORY - **C. A. 605**

—— *Ibbotson* v. *Peat* (1865) 3 H. & C. 644.
Applied. HOLLYWOOD SILVER FOX FARM, LD. *v.* EMMETT **Macnaghten J. 468**

—— *Income Tax Commissioners* v. *Pemsel* [1891] A. C. 531, 583.
Statement applied. PETERBOROUGH ROYAL FOXHOUND SHOW SOCIETY *v.* INLAND REVENUE COMMISSIONERS **Lawrence J. 497**

—— *Inland Revenue Commissioners* v. *Miller* [1930] A. C. 222.
Distinguished. REED *v.* CATTERMOLE **Div. Ct. 645**

—— *Izzard* v. *Universal Insurance Co., Ld.* [1936] 2 K. B. 303.
Reversed - - - **C. A. 555**

CASES—*continued.*

—— *James* v. *Probyn.* Unreported. Observations of Swift J. applied. Strangways-Lesmere *v.* Clayton **Horridge J. 11, 17**

—— *Keeble* v. *Hickeringill* (1706) 11 Mod. 74, 130; 11 East, 574 n. Applied. Hollywood Silver Fox Farm, Ld. *v.* Emmett **Macnaghten J. 468**

—— *London & North Eastern Ry. Co.* v. *Brentnall* [1933] A. C. 489. Distinguished. Alderman *v.* Great Western Ry. Co. - - **C. A. 90**

—— *London Joint Committee, Ex parte. Rex* v. *Electricity Commissioners* [1924] 1 K. B. 171. Applied. Rex *v.* Minister of Health. *Ex parte* Villiers **Div. Ct. 29**

—— *Morisse* v. *Royal British Bank* (1856) 1 C. B. (N. S.) 67, 86. Applied. Rex *v.* Minister of Health. *Ex parte* Villiers **Div. Ct. 29**

—— *Nash* v. *Stevenson Transport, Ld.* [1935] 2 K. B. 341. Affirmed - - - **C. A. 128**

—— *Neumann* v. *Inland Revenue Commissioners* [1934] A. C. 215. Discussed and distinguished. Commissioners of Inland Revenue *v.* Pearson - - **Lawrence J. 533**

—— *Neumann* v. *Commissioners of Inland Revenue* [1933] 1 K. B. 728; [1934] A. C. 215; 18 Tax Cas. 332. Explained and distinguished. Countess of Shrewsbury *v.* Commissioners of Inland Revenue **Lawrence J. 582**

—— *Nicholson* v. *Jackson* (1921) 37 Times L. R. 887. Distinguished, but observation of Lord Cave applied. Strood Estates Co., Ld. *v.* Gregory **C. A. 605**

—— *North British Ry. Co.* v. *Scott* [1923] A. C. 37; 8 Tax Cas. 332. Applied. Countess of Shrewsbury *v.* Commissioners of Inland Revenue - - **Lawrence J. 582**

—— *Parkfield Trust, Ld.* v. *Curtis* [1934] 1 K. B. 685. Discussed and followed. Mason & Wood, Ld. *v.* Greene **Macnaghten J. 370**

—— *Payne* v. *British Time Recorder Co.* [1921] 2 K. B. 1. Applied. Green *v.* Berliner **du Parcq J. 477**

CASES—*continued.*

—— *Perry's Case*, cited in *Roach* v. *Garvan* (1742) 2 Atk. 469; Dick. 794. Referred to. Gaskell & Chambers, Ld. *v.* Hudson, Dodsworth & Co. **Div. Ct. 595**

—— *Philbin* v. *Hayes* (1918) 11 B. W. C. C. 85. Applied. Alderman *v.* Great Western Railway Co. **C. A. 90**

—— *Reg.* v. *Pawlett* (1873) L. R. 8 Q. B. 491. Distinguished. Governors of Queen Anne's Bounty *v.* Pitt-Rivers - - - **Div. Ct. 416**

—— *Reg.* v. *Payne and Cooper* [1896] 1 Q. B. 577. Observations adopted. Gaskell & Chambers, Ld. *v.* Hudson, Dodsworth & Co. - **Div. Ct. 595**

—— *Rex* v. *Electricity Commissioners. Ex parte London Joint Committee* [1924] 1 K. B. 171. Applied. Rex *v.* Minister of Health. *Ex parte* Villiers **Div. Ct. 29**

—— *Roach* v. *Garvan* (1742) 2 Atk. 469; Dick. 794. Referred to. Gaskell & Chambers, Ld. *v.* Hudson, Dodsworth & Co. **Div. Ct. 595**

—— *Shrewsbury Estate Acts, In re. Shrewsbury* v. *Shrewsbury* [1924] 1 Ch. 315. Explained and held applicable. Countess of Shrewsbury *v.* Commissioners of Inland Revenue **Lawrence J. 582**

—— *Smith's Estate, In re. Clements* v. *Ward* (1887) 35 Ch. D. 589, 595. Statement of principle by Stirling J. approved and followed. Rex *v.* Minister of Health. *Ex parte* Villiers - - - **Div. Ct. 29**

—— *Tarling* v. *Rome* (1936) 52 Times L. R. 220. Approved and followed. Green *v.* Berliner - - **du Parcq J. 477**

—— *Tennant* v. *Smith* [1892] A. C. 150. Distinguished. Reed *v.* Cattermole **Div. Ct. 645**

—— *Thomas* v. *Moore* [1918] 1 K. B. 555. Applied. Green *v.* Berliner **du Parcq J. 477**

—— *Trollope & Sons* v. *Martyn Brothers* [1934] 2 K. B. 436. Distinguished. George Trollope & Sons *v.* Caplan - - **C. A. 382**

—— *White* v. *Bembridge* [1935] 1 K. B. 244. Followed and applied. Heginbottam *v.* Watts - - **C. A. 6**

CASES—*continued.*

—— *William Thomas Shipping Co.* (*The*), *In re* [1930] 2 Ch. 368.
Referred to. GASKELL & CHAMBERS, LD. *v.* HUDSON, DODSWORTH & CO. **Div. Ct. 595**

CERTIFICATE—Of insurance against third-party risks—Cancellation—Effect
See INSURANCE (MOTOR) **3.** **253**

—— Of medical referee—No power in county court registrar to remit **1**
See WORKMEN'S COMPENSATION **4.**

CERTIFIED INSTITUTION—Mental defective guilty of offence ordered to —Authority responsible for maintenance—Place of residence—Presumption - - - - - **298**
See LOCAL GOVERNMENT **1.**

CHARITY—Society to promote live-stock breeding, whether a—Income tax
See REVENUE **6.** **497**

CHEQUE—" Refer to drawer " written on by banker—Claim for libel - **107**
See ATTACHMENT OF DEBT.

CLIENT ACCOUNT—Kept by solicitor with bank—Debt due from banker to solicitor—Garnishee order on bank in respect of debt—Cheque by solicitor on client account marked " refer to drawer "—Claim for libel
See ATTACHMENT OF DEBT. **107**

COAL MINE—Rent consisting partly of free coal—Mineral rights duty whether leviable on value of free coal **316**
See REVENUE **10.**

COLLISION—Between ship in tow and tug—Payment of damage by shipowner under towage contract—Liability of underwriter of policy on ship to indemnify shipowner - - **461**
See INSURANCE (MARINE) **2.**

COMMENT—By agent of defendant adverse to pending action—Liability to attachment of defendant and agent
See CONTEMPT OF COURT. **595**

COMMISSION—Of estate agent—Mistake in vendor's instructions to agent—Consequent withdrawal of intending purchaser—Agent's damages - **382**
See PRINCIPAL AND AGENT.

COMMITTAL FOR TRIAL—Of person charged with indictable offence—Invalidity — Where depositions irregularly taken - - - **442**
See CRIMINAL LAW.

COMMON INFORMER — Claims by for penalties—Place used for public entertainment on Lord's day - **477**
See SUNDAY OBSERVANCE.

COMPANY—*Director—Agreement to act in development of estate—Omission to acquire qualification shares—Right to sue on quantum meruit for services rendered—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 141, 143.
CRAVEN-ELLIS *v.* CANONS, LD. **C. A. 403**

—— Dividend — No deduction of income tax—Shareholder's liability for tax
See REVENUE **8.** **533**

—— Servant—Agreement by to take shares — Payment to be by deductions from wages—Whole of wages not paid in coin—Illegality of agreement.
See MASTER AND SERVANT. **193**

COMPENSATION—For workman.
See WORKMEN'S COMPENSATION.

COMPOUNDED RATE—Payment of by landlord—Permitted increase of rent—Percentage of net rent—" Net rent " whether standard rent less compounded rate or less assessed rate - - - - - **605**
See LANDLORD AND TENANT **1.**

CONSENT OF PARTIES—Necessity of to enable county court judge to refer whole action to registrar - **324**
See COUNTY COURT.

CONSOLIDATION — Of actions by two separate plaintiffs against same defendant—Recovery by one plaintiff of more and of the other of less than amount paid into Court in respect of his claim—Order as to costs - - - - - **550**
See COSTS.

CONTEMPT OF COURT—*Publication of statement of claim and comments pending trial of action—Act of agent of defendants without their knowledge or consent—Applications for writs of attachment against defendants and agent dismissed.*
GASKELL & CHAMBERS, LD. *v.* HUDSON, DODSWORTH AND CO. THE KING *v.* HUDSON. *Ex parte* GASKELL & CHAMBERS, LD. **Div. Ct. 595**

CONTRACT—Between company and director—Provision for remuneration — Invalidity of contract—Right of director to sue for quantum meruit
See COMPANY. **403**

—— Between employer and workman — Insurer to be liable for death of person carried on motor vehicle under—Contract whether with insured only or with any employer **555**
See INSURANCE (MOTOR) **2.**

—— Between hirer of taxicab and passenger —For sharing of fare—Express carriage - - - - **632**
See ROAD TRAFFIC **1.**

CONTRACT—*continued.*

—— Between moneylender and borrower—Memorandum—Requisites of **370**
See MONEYLENDER.

—— Between motor insurance companies—"Knock for knock" agreement—Effect of - - - - **359**
See INSURANCE (MOTOR) **1**.

—— Between servant and employing company—For servant to take shares in company and pay by deduction from wages—Whole of wages not paid in coin—Illegality - **193**
See MASTER AND SERVANT.

—— Between shipowner and Admiralty for use of tug—Payment by shipowner under—Liability of underwriter of policy on ship to indemnify shipowner - - - - - **461**
See INSURANCE (MARINE) **2**.

—— Between trader entitled to licence of goods vehicle and another person—For use of name and vehicle by the latter—Illegality - - - **128**
See ROAD TRAFFIC **2**.

—— Of employment—Insurer to be liable for death of person carried on motor vehicle under—Contract whether with insured only or with any employer - - - **555**
See INSURANCE (MOTOR) **2**.

CONTROL—Of dwelling-house—Under rent restriction—Burden of proof - **6**
See LANDLORD AND TENANT **2**.

CONVEYANCE ON SALE—Sale to same purchaser of land in several lots from same vendor—Each sale not part of a series of transactions
See REVENUE **11**. **246**

COPYRIGHT—*Infringement—Artist's drawings—Offending drawings acquired bona fide without knowledge of infringement—Exhibition in public by way of trade—Posters and showcards—Complaint by owner of copyright—Reasonable time to investigate—Time for physical removal of posters—Writ issued prematurely—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 2, *sub-s.* 2.
VAN DUSEN *v.* KRITZ - **Goddard J. 176**

COSTS—*Actions by separate plaintiffs against same defendants—Consolidation—Payments into court—Recovery by one plaintiff of more and by the other plaintiff of less than amount paid in in respect of his claim—Form of order as to costs.*
ENGLISH *v.* BLOOM AND THE LONDON PASSENGER TRANSPORT BOARD. SIEGENBERG *v.* BLOOM AND THE LONDON PASSENGER TRANSPORT BOARD [CONSOLIDATED].
Singleton J. 550

—— Security for.
See SECURITY FOR COSTS.

COSTS—*continued.*

—— Taxation—Discretion of county court registrar as to amount—Jurisdiction of judge to review - **138**
See WORKMEN'S COMPENSATION **3**.

COUNTERCLAIM—For price of shares—In action by servant against employer company for wages paid in shares of company—Illegality - - **193**
See MASTER AND SERVANT.

COUNTY COURT—*Action—Jurisdiction—Power of judge to refer action to registrar for inquiry and report—Consent of parties—Absence of consent—County Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *s.* 6—*County Courts (Amendment) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 17), *s.* 20.
MORGAN *v.* CULLEN - - **C. A. 324**

—— Appeal from to High Court—Against order for tithe rentcharge—Usual remedy - - - - - **416**
See ECCLESIASTICAL LAW.

—— Application to for tithe rentcharge—No notice of opposition by landowner—Right of landowner to be heard - - - - - **416**
See ECCLESIASTICAL LAW.

—— Prohibition to—In respect of order for tithe rentcharge—When it lies **416**
See ECCLESIASTICAL LAW.

—— Registrar — Functions of in connection with medical reference only ministerial - - - - - **1**
See WORKMEN'S COMPENSATION **4**.

—— Taxation of costs—Discretion of registrar as to amount—Jurisdiction of judge to review - - - **138**
See WORKMEN'S COMPENSATION **3**.

—— Transfer of action to—Defendant's application for—Discretion of judge
See PRACTICE. **215**

COURT—Contempt of.
See CONTEMPT OF COURT.

—— County court.
See COUNTY COURT.

—— High Court.
See HIGH COURT.

——Railway and Canal Commission.
See RAILWAY AND CANAL COMMISSION.

CRIMINAL LAW—*Indictment—Committal for trial—Depositions irregularly taken—Effect—Indictable Offences Act,* 1848 (11 *&* 12 *Vict. c.* 42), *s.* 17—*Administration of Justice (Miscellaneous Provisions) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 2, *sub-s.* 1.
REX *v.* GEE. REX *v.* BIBBY. REX *v.* DUNSCOMBE - - - **C. C. A. 442**

DAMAGE—To motor-car in collision—Full amount recovered from owner of colliding car—Amount recovered held in trust for insurance company to extent of sum previously received from it - - - - - 359
See INSURANCE (MOTOR) 1.

—— To vessel by collision — Payment of by shipowner under contract—Liability of underwriter of policy on ship to indemnify shipowner - - 461
See INSURANCE (MARINE) 2.

DAMAGES—Amount recoverable by vendor's estate agent—Where mistake in vendor's instructions and consequent withdrawal of intending purchaser - - - - 382
See PRINCIPAL AND AGENT.

DEATH—Of person caused by motor vehicle —Insurance against of owner of vehicle—Insurer liable in respect of person carried under contract of employment—Contract of employment whether with insured only, or with any employer - 303, 555
See INSURANCE (MOTOR) 2.

DEBT—Appropriation of payment to one of two debts—Evidence—Intention of debtor - - - - 156
See APPROPRIATION OF PAYMENTS.

—— Due from banker to solicitor—Garnishee order nisi—Client account—Cheque dishonoured after service of order—" Refer to drawer "—Claim for libel - - - - 107
See ATTACHMENT OF DEBT.

DECLARATION—By insurer—Of right to avoid policy against third-party risks—Absence of—Effect - 253
See INSURANCE (MOTOR) 3.

DECONTROL — Of dwelling-house — From rent restriction—Burden of proof 6
See LANDLORD AND TENANT 2.

DECREE—Nullity of marriage—Additional assessments to income tax on difference between single and married man's allowance—Competence of - - - - 503
See REVENUE 4.

DEDUCTION—From wages—In payment by servant for shares in employing company—Whole of wages not paid in coin—Illegality of contract
See MASTER AND SERVANT. 193

—— Of income tax—Dividend paid without —Shareholder's liability for tax 533
See REVENUE 8.

—— —— Jointure rentcharge payable clear of — Assessment of super-tax and sur-tax—Rentcharge plus income tax thereon - - 582
See REVENUE 9.

DEDUCTION—*continued.*

—— —— On payment of interest—Set-off of profits of year against losses of former years - - - 185
See REVENUE 2.

—— Of monopoly value—In estimating gross value of licensed premises 447
See RATING 2.

DEFECTIVE.
See MENTAL DEFECTIVE.

DEFENDANT—Joinder of several defendants in same action - - - 477
See SUNDAY OBSERVANCE.

—— Publication by agent of adverse to pending action — Liability to attachment of defendant and agent
See CONTEMPT OF COURT. 595

DEPOSITIONS—Before committing justices —Irregularity in taking—Effect—Indictment invalid - - 442
See CRIMINAL LAW.

DIRECTOR—Of company—Agreement for remuneration—Omission to acquire qualification shares—Right to sue for services rendered - 403
See COMPANY.

DISCOVERY — *Privilege* — *Public interest* — *Return to Potato Marketing Board*— *Agricultural Marketing Act*, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *ss.* 1, 5, 17, *sub-s.* 2.
ROWELL *v.* PRATT - - - C. A. 226

DISCRETION — Of Judge — As to joinder of several defendants - - 477
See SUNDAY OBSERVANCE.

—— —— On application by defendant for security for costs or transfer of action to county court - - 215
See PRACTICE.

—— Of plaintiffs' solicitor—As to two plaintiffs suing the same defendant on one or separate writs - 550
See COSTS.

DIVIDEND—Payment without deduction of income tax—Shareholder's liability for tax - - - - 533
See REVENUE 8.

DRAWEE—Absence of name of from form of bill—Subsequent insertion and alteration — Acceptance obtained by fraud—Acceptor's name inserted as addressee without his knowledge —Liability of acceptor to holder for value - - - - - 101
See BILL OF EXCHANGE.

DWELLING-HOUSE — Decontrol — Onus of proof - - - - 6
See LANDLORD AND TENANT 2.

—— Increase of rent—Permitted increases 605
See LANDLORD AND TENANT 1.

ECCLESIASTICAL LAW—*Tithe rentcharge—Application by titheowner to county court for payment—No notice of opposition by landowner—Right of landowner to be heard—Rules requiring notice of opposition, whether ultra vires—Order for payment and appointment of receiver—Alleged excess of jurisdiction—Remedy—Prohibition or appeal—Whether prohibition lies against receiver—Tithe Act,* 1891 (54 *Vict. c.* 8), *s.* 2, *sub-ss.* 1, 7; *s.* 3, *sub-s.* 1—*Tithe Rentcharge Recovery Rules,* 1891–1933, *rr.* 5, 8, 9, 11.
GOVERNORS OF QUEEN ANNE'S BOUNTY *v.* PITT-RIVERS - - - **Div. Ct. 416**

EMOLUMENTS OF OFFICE—Minister of Methodist Church—Required residence in manse—Payment of Sch. A tax and rates by Church—Liability of minister to Sch. E income tax in respect of - - - **645**
See REVENUE **5**.

EMPLOYMENT—Accident arising out of—Railway ticket collector—Fall in street while proceeding from lodgings to station - - **90**
See WORKMEN'S COMPENSATION **1**.

—— Act of injured workman whether in course of—Prohibited act - **330**
See WORKMEN'S COMPENSATION **2**.

—— Contract of—Death of person carried on motor vehicle under—Insurer to be liable for—Contract of employment, whether with insured only or any employer - - **303, 555**
See INSURANCE (MOTOR) **2**.

—— —— Wages—Deductions—Illegality
See MASTER AND SERVANT. **193**

ENTRY—On private premises—By police officer making inquiries—Right to remain after direction by owner to leave - - - - **434**
See POLICE.

ERROR.
See MISTAKE.

EVIDENCE—Examination by officer of passenger in motor vehicle as to who is paying the fare—Duty to administer caution - - - **632**
See ROAD TRAFFIC **1**.

—— Of appropriation of payment to one of two debts—Intention of debtor—Sufficiency - - - **156**
See APPROPRIATION OF PAYMENTS.

EXCHANGE OF LAND—For land at a distance—Proposal for by local authority—Power under special Act to exchange for adjoining land—Power under general Act to exchange for any other land—Prohibition - - - - **29**
See LOCAL GOVERNMENT **2**.

EXECUTION OF DUTY—By police officer—Remaining on private premises for inquiries after direction to leave
See POLICE. **434**

EXPRESS CARRIAGE — Taxicab — Sharing of fare by passengers—Antecedent contract - - - - **632**
See ROAD TRAFFIC **1**.

FARE—Of taxicab—Sharing of by passengers—Express carriage - - **632**
See ROAD TRAFFIC **1**.

FEES—Of medical witnesses—In bill of costs—Discretion of county court registrar as to amount—Jurisdiction of judge to review - - **138**
See WORKMEN'S COMPENSATION **3**.

FOOTPATH.
See PUBLIC FOOTPATH.

FRAUD—Acceptance of bill obtained by—Liability of acceptor to bona fide holder for value without notice **101**
See BILL OF EXCHANGE.

GARNISHEE ORDER.
See ATTACHMENT OF DEBT.

GOODS VEHICLE—Licence—Trader entitled to—Agreement for use of name and vehicle by another person—Illegality
See ROAD TRAFFIC **2**. **128**

GROSS VALUE—Of licensed premises—Estimation of—Deduction of monopoly value - - - - **447**
See RATING **2**.

HIGH COURT—Appeal to from county court—Against order for tithe rentcharge—Usual remedy - - **416**
See ECCLESIASTICAL LAW.

—— Judge — Discretion — As to joinder of several defendants - - **477**
See SUNDAY OBSERVANCE.

—— —— —— On application by defendant for security for costs or transfer to county court - - - **215**
See PRACTICE.

—— —— How far bound by previous decision of another judge - **477**
See SUNDAY OBSERVANCE.

—— —— Jurisdiction — To order interpleader issue between husband and wife - - - - - **164**
See HUSBAND AND WIFE.

—— Payment into.
See PAYMENT INTO COURT.

HIGHWAY — *Footpath — Extinction or Diversion — Sand and gravel pit—Ancillary right — Facility — Jurisdiction of Railway and Canal Commission — Mines (Working Facilities and Support) Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *ss.* 3, 13.
Hoddesdon Urban District Council *v.* Broxbourne Sand and Ballast Pits, Ld. Hertfordshire County Council *v.* The Same - - - - **R. & C. C. 19**

HOLDER—Of bill of exchange—Bona fide holder for value—Liability to of acceptor where acceptance obtained by fraud - - - - **101**
See Bill of Exchange.

HOSPITAL — Nurse — Administration of drug—Overdose—Liability - **11**
See Negligence **1.**

HOUSE—Rent restriction.
See Dwelling-house.

—— Sale of.
See Sale of House.

HOUSING—General Act—Power to exchange lands for any other lands—Open space—Special Act—Power to exchange lands for other adjoining lands—Proposal to exchange part of open space for land at a distance—Prohibition - - - **29**
See Local Government **2.**

HUSBAND AND WIFE — *Interpleader — Dispute as to ownership of property—Property stored by wife—Action in detinue by husband against warehousemen—Right of warehousemen to interplead—Order directing issue to be tried—Husband to be plaintiff and wife defendant—Jurisdiction to make order—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *ss.* 12, 17—*R. S. C., Order* LVII., *r.* 7.
De La Rue *v.* Hernu, Peron & Stockwell, Ld. De La Rue (Claimant) - **C. A. 164**

—— Two debts owing by husband to wife—Appropriation of payments to one debt — Intention — Evidence **156**
See Appropriation of Payments.

IMPROVEMENT—Of dwelling-house—Right of landlord to increase of rent calculated on expenditure - **605**
See Landlord and Tenant **1.**

INCOME TAX.
See Revenue **1-9.**

INCREASE OF RENT—Improvement by landlord—Right to increase of rent calculated on expenditure - **605**
See Landlord and Tenant **1.**

—— Rates paid by landlord—Rates compounded—Permitted increases — Percentages of net rent—" Net rent " whether standard rent less compounded rate or less assessed rate - - - - - **605**
See Landlord and Tenant **1.**

INCREASED VALUE POLICY.
See Policy.

INDICTMENT — Invalidity — Depositions irregularly taken - - - **442**
See Criminal Law.

INFORMER.
See Common Informer.

INFRINGEMENT—Of copyright in drawings—Offending drawings acquired bona fide—Complaint—Reasonable time to investigate — Writ issued prematurely - - - - **176**
See Copyright.

INJURY—To motor-car in collision—Payment to plaintiff by plaintiff's insurer of part damage—Subsequent claim by plaintiff against defendant for full amount — " Knock for knock " agreement between insurers—Effect - - - - **359**
See Insurance (Motor) **1.**

—— To person
See Personal Injury.

INSTALMENTS—Monopoly value of licensed premises payable by — Capital charge — Deduction in estimating gross value - - - - **447**
See Rating **2.**

INSURANCE (MARINE) — *Insurance of cargo for full value at date of policy—Increase in value of cargo—Increased value policy effected without knowledge of original Insurers—Total loss—Both policies paid in full—Letters of subrogation to both insurers—Salvage—Claim by increased value underwriters to contribution—Original insurers held entitled to whole amount.*
Boag *v.* Standard Marine Insurance Co., Ld. - - - **Branson J. 121**

2. —— *Policy on ship—Running down clause—Indemnification of shipowner against damages paid in consequence of collision—Contract between shipowner and Admiralty for use of Admiralty tug—Shipowner to make good all damage to tug—Collision between insured ship and tug caused by negligence of tug—Payment by shipowner to Admiralty for damage to tug—Liability of underwriter to indemnify shipowner—Payment arising from contract and not from tort.*
Furness Withy & Co., Ld. *v.* Duder **Branson J. 461**

INSURANCE (MOTOR)—*Injury to motor-car—Payment to plaintiff by plaintiff's insurance company of part of damage suffered—Subsequent claim by plaintiff against defendant for full amount—" Knock-for-knock " agreement between plaintiff's and defendant's insurance companies—Direction by plaintiff's insurers to plaintiff not to claim—Effect on plaintiff's claim against defendant.*
Morley *v.* Moore - - **C. A. 359**

INSURANCE (MOTOR)—*continued.*

2. —— *Third-party liability—Insurance of owner of motor vehicle in respect of death of person caused by use thereof — Insurer not to be liable in respect of person carried other than passenger carried by reason of contract of employment—"Contract of employment" whether with insured person only or with any employer—Provisions in policy purporting to exclude personal risk—Validity—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 1 (*b*) (*i.*) (*ii.*).
Izzard *v.* Universal Insurance Co., Ld. - - - - - **C. A. 555**

3. —— —— *Judgment recovered by third party against insured—Action under statutory provision by third party against insurer for amount of judgment — Certificate of insurance properly cancelled before coming into force of statutory provision—Proceedings against insured commenced before that event, but judgment obtained subsequently thereto—Declaration of right to avoid policy not obtained—Effect—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 5—*Road Traffic Act,* 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 1, 3 ; *s.* 42.
Croxford *v.* Universal Insurance Co., Ld. Norman *v.* Gresham Fire and Accident Insurance Society, Ld. **C. A. 253**

INTENTION—Of debtor—To appropriate payment to one of two debts—Inference - - - - **156**
See Appropriation of Payments.

INTEREST—On loan by banker—Interest debited by banker to loan account —Right of borrower to recover income tax on interest - **59**
See Revenue **3.**

—— On money lent — No statement in memorandum that interest calculated in accordance with Act—Enforceability of contract - **370**
See Moneylender.

—— Payment of under deduction of income tax—Set-off of profits of year against losses of former years—Profits brought into charge - **185**
See Revenue **2.**

INTERPLEADER—Issue in which husband plaintiff and wife defendant — Whether an action — Jurisdiction of judge to direct issue - **164**
See Husband and Wife.

JOINDER—Of several defendants.
See Sunday Observance.

JOINTURE RENT-CHARGE—Payment clear of all deductions for taxes—Assessment of sur-tax—Whether on net rent-charge or on net rent-charge plus income tax thereon - **582**
See Revenue **9.**

JUDGE—Of county court—Jurisdiction—Absence of—To refer whole action to registrar for inquiry without consent of parties - - **324**
See County Court.

—— —— —— To review decision of registrar on taxation of costs **138**
See Workmen's Compensation **3.**

—— —— Prohibition to - - **416**
See Ecclesiastical Law.

—— Of High Court — Discretion — As to joinder of several defendants **477**
See Sunday Observance.

—— —— —— On application by defendant for security for costs or transfer to county court - - - **215**
See Practice.

—— —— How far bound by previous decision of another judge - **477**
See Sunday Observance.

—— —— Jurisdiction — To order interpleader issue between husband and wife - - - - - - **164**
See Husband and Wife.

JUDGMENT—Recovery of by third party against insured—Action on by third party against insurer - - **253**
See Insurance (Motor) **3.**

JURISDICTION—Of county court judge—Alleged excess of—Prohibition **416**
See Ecclesiastical Law.

—— —— To refer whole action to registrar for inquiry - - - **324**
See County Court.

—— —— To review decision of registrar on taxation of costs - - **138**
See Workmen's Compensation **3.**

—— Of county court registrar—Absence of in regard to medical reference **1**
See Workmen's Compensation **4.**

—— Of High Court Judge—To order interpleader issue between husband and wife - - - - - **164**
See Husband and Wife.

—— Of Railway and Canal Commission—To extinguish or divert public footpath - - - - - **19**
See Highway.

JUSTICES—Depositions irregularly taken before—Effect—Indictment invalid
See Criminal Law. **442**

KEEPER—Of place used for public entertainment on Lord's day—Penalty
See Sunday Observance. **477**

"KNOCK FOR KNOCK" AGREEMENT—Between motor insurance companies —Effect - - - - - **359**
See Insurance (Motor) **1.**

KNOWLEDGE—Of defendant—Absence of, as to publication by his agent of matter adverse to pending action—Liability to attachment - - 595
See Contempt of Court.

—— Of person in possession of drawings—As to infringement of patent—Absence of—Allowance of reasonable time before action for infringement - - - - - 176
See Copyright.

LAND—Sale of—Stamp duty - - 246
See Revenue **11.**

—— Unoccupied land — Income tax — Assessment of person entitled to beneficial use - - - 521
See Revenue **1.**

—— User of—Noise maliciously caused on in order to injure owner of adjoining land - - - - - 468
See Nuisance.

LANDLORD AND TENANT—*Rent restriction—Dwelling-house—Increase of rent—Landlord responsible for whole of repairs—Rates paid by landlord—Rates compounded—Permitted increases—Percentages of net rent—"Net rent," whether standard rent less compounded rate or less assessed rate—Percentage of sum expended by landlord on improvement—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 1 (*a*), (*c*), (*d*), (*e*); *s.* 12, *sub-s.* 1 (*c*).
Strood Estates Co., Ld. *v.* Gregory **C. A. 605**

2. —— —— —— *Rateable value under* 20*l.*—*Decontrol—Onus of proof—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 1, *sub-s.* 2.
Heginbottam *v.* Watts - - **C. A. 6**

LEASE—Of coal mine—Rent consisting partly of free coal—Mineral rights duty whether leviable on value of free coal - - - - 316
See Revenue **10.**

LIBEL—Claim for—In respect of words "refer to drawer" written on cheque - - - - 107
See Attachment of Debt.

LICENCE—Goods vehicle licence—Agreement for use of licensed trader's name and vehicle by another person—Illegality - - - - 128
See Road Traffic **2.**

—— Road service licence — Vehicle not to be used except under — Taxicab of which fare shared by passengers—Express carriage 632
See Road Traffic **1.**

LICENSED PREMISES—Monopoly value—Deduction in estimating gross rental 447
See Rating **2.**

—— Tied house — Rateable value - 283
See Rating **1.**

LIVE-STOCK BREEDING—Society to promote—Profits—Income tax 497
See Revenue **6.**

LOAN—By bank—Interest debited by bank to loan account—Right of borrower to recover income tax on interest 59
See Revenue **3.**

—— By moneylender — Memorandum — Requisites - - - - 370
See Moneylender.

LOCAL GOVERNMENT—*Mental deficiency—Mental defective found guilty of offence—Ordered to a certified institution—Place of residence—Presumption — Authority responsible for maintenance of mental defective—Mental Deficiency Act,* 1913 (3 & 4 *Geo.* 5, *c.* 28), *ss.* 43, 44.
London County Council *v.* Cambridgeshire County Council - **Div. Ct. 298**

2. —— *Open space—Special Act—Power to exchange lands for other adjoining lands—Housing—General Act—Power to appropriate any lands vested in local authority in exchange for other lands whether adjoining or not, subject to certificate of Minister—Proposal to appropriate part of open space in exchange for land at a distance—Generalia specialibus non derogant—Extent of principle—Prohibition—London Open Spaces Act,* 1893 (56 & 57 *Vict. c. lxxi.*), *ss.* 5 *and* 12—*Housing Act,* 1925 (15 & 16 *Geo.* 5, *c.* 14), *ss.* 65, 103, 120, *sub-s.* 1; 134.
The King *v.* Minister of Health. *Ex parte* Villiers - - - **Div. Ct. 29**

LORD'S DAY—Place used for public entertainment on—Disorderly house—Penalty - - - - 477
See Sunday Observance.

LOSS.
See Total Loss.

LUNACY.
See Mental Deficiency.

MAINTENANCE—Of mental defective guilty of offence and ordered to institution—Authority responsible for—Place of residence—Presumption - 298
See Local Government **1.**

MANAGER—Competition among brewers for premises to be occupied by as tied house—Rateable value - - 283
See Rating **1.**

MANSE—Required residence in—Of minister of Methodist Church—Payment of Sch. A tax and rates by Church—Whether emoluments of office—Liability to income tax - **645**
See REVENUE **5**.

MARINE INSURANCE.
See INSURANCE (MARINE).

MARKET VALUE—Of licensed premises—Where competition for among brewers - - - - **283**
See RATING **1**.

MARRIED MAN—Personal allowance for income tax purposes—Decree of nullity—Additional assessments on difference between single and married man's allowances—Competence of - - - - **503**
See REVENUE **4**.

MASTER AND SERVANT—*Wages — Deductions— Agreement by servant to take shares in employing company—Payment to be made weekly by deductions from wages—Wages not paid in current coin of Realm—Illegality of contract—Counterclaim for price of shares—Truck Act,* 1831 (1 & 2 *Will.* 4, *c.* 37), *ss.* 1, 3, 4, 25—*Truck Amendment Act,* 1887 (50 & 51 *Vict. c.* 46), *s.* 2.
KENYON *v.* DARWEN COTTON MANUFACTURING CO., LD. - - - **C. A. 193**

—— Whether relationship exists between hospital and skilled nurse—Liability of hospital for negligence of nurse - - - - **11**
See NEGLIGENCE **1**.

MASTER OF CEREMONIES—At place used for public entertainment on Lord's day—Penalty - - - **477**
See SUNDAY OBSERVANCE.

MATERIAL ALTERATION—Of bill of exchange.
See BILL OF EXCHANGE.

MEDICAL REFEREE—Reference to—Functions of county court registrar in connection with purely ministerial **1**
See WORKMEN'S COMPENSATION **4**.

MEMORANDUM—Of moneylending contract — Requisites — Statement that interest calculated in accordance with Act - - - - **370**
See MONEYLENDER.

MENTAL DEFICIENCY — Defective guilty of offence and ordered to institution —Authority responsible for maintenance—Place of residence—Presumption - - - - **298**
See LOCAL GOVERNMENT **1**.

METHODIST CHURCH — Minister of — Required residence in manse—Payment of Sch. A tax and rates by Church—Emoluments of office—Liability to Sch. E income tax **645**
See REVENUE **5**.

MINES AND MINERALS — Coal mine — Mineral rights duty—Rental value
See REVENUE **10**. **316**

—— Sand and gravel pit—Right to work—Alleged ancillary right to extinction or diversion of public footpath **19**
See HIGHWAY.

MINISTER OF HEALTH—Prohibition to—Against consenting to appropriation by local authority of part of open space for housing - - **29**
See LOCAL GOVERNMENT **2**.

MINISTER OF METHODIST CHURCH — Required residence in manse—Payment of Sch. A tax and rates by Church—Emoluments of office —Liability to Sch. E income tax **645**
See REVENUE **5**.

MISTAKE—In vendor's instructions to estate agent—Consequent withdrawal of intending purchaser—Agent's damages - - **382**
See PRINCIPAL AND AGENT.

MONEYLENDER—*Moneylending transaction —Promissory note as security—Memorandum of contract—Lump sum payable as interest—Statement that it is equivalent to interest at specified rate—Interest calculated in accordance with Sch. I. of the Moneylenders Act,* 1927 *—No statement that it was so calculated—Promissory note and contract unenforceable—Moneylenders Act,* 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-s.* 2.
MASON & WOOD, LD. *v.* GREENE **C. A. 370**

MONOPOLY VALUE — Of licensed premises —Deduction in estimating gross rental - - - - - **447**
See RATING **2**.

MOTOR INSURANCE.
See INSURANCE (MOTOR).

MOTOR VEHICLE—Insurance.
See INSURANCE (MOTOR).

NEGLIGENCE — *Nurses — Hospital — Operation — Administration of drugs—Relation of hospital to patient.*
STRANGWAYS-LESMERE *v.* CLAYTON
Horridge J. 11

2. —— *Sale of House—Builder's Duty as Vendor—Defective ceiling — Warranty to purchaser—No Duty to occupant—Proximate relationship — Concealed defect — Opportunity to inspect.*
OTTO *v.* BOLTON AND NORRIS
Atkinson J. 46

—— Tort, action founded on—Application by defendant for security for costs or transfer to county court—Discretion of judge - - - **215**
See PRACTICE.

NET RENT—Of which increase of rent is a percentage—Meaning of - **605**
See Landlord and Tenant **1.**

NOISE—Maliciously caused by one of two adjoining landowners on own land in order to injure the other - **468**
See Nuisance.

NOTICE OF OPPOSITION—By landowner to application in county court for tithe rentcharge—Absence of—Right to be heard - - - **416**
See Ecclesiastical Law.

NUISANCE — *User of land* — *Acts done maliciously by defendant on his own land to injure plaintiff in his user of his adjoining land.*
Hollywood Silver Fox Farm, Ld. *v.* Emmett - - - **Macnaghten J. 468**

NULLITY OF MARRIAGE — Decree — Additional assessments to income tax on difference between single and married man's allowances—Competence of - - - - **503**
See Revenue **4.**

NURSE — At hospital—Administration of drug — Overdose — Liability of nurse—Liability of hospital - **11**
See Negligence **1.**

OBLIGATION—To pay reasonable remuneration for work done in absence of contract—Basis of - - **403**
See Company.

OBSTRUCTION—Of police officer—Whether caused while in execution of duty
See Police. **434**

OCCUPATION — Of land — For income tax purposes—Liability of person entitled to beneficial occupation **521**
See Revenue **1.**

OFFICE—Of minister of Methodist Church—Emoluments of—Required residence in manse—Payment of Sch. A tax and rates by Church—Liability of minister to Sch. E income tax in respect of - - - - **645**
See Revenue **5.**

ONUS OF PROOF.
See Burden of Proof.

OPEN SPACE—Special Act—Power to exchange lands for adjoining lands—Housing — General Act — Power to exchange lands for any other lands —Effect of legislation - - **29**
See Local Government **2.**

ORDER—Garnishee order.
See Attachment of Debt.

ORDER—*continued.*

—— Of county court judge — Referring whole action to registrar without consent of parties—Invalidity **324**
See County Court.

——Of High Court judge—As to costs—Where in a consolidated action one plaintiff recovers more and the other less than the amount paid into Court in respect of his claim - - **550**
See Costs.

—— —— For interpleader issue between husband and wife—Jurisdiction
See Husband and Wife. **164**

—— Whether resolution of local authority for appropriation of land should be by - - - - - **29**
See Local Government **2.**

PARTIES—Defendants—Joinder of several in same action - - - **477**
See Sunday Observance.

PASSENGER—In taxicab—Sharing of fare by, pursuant to antecedent contract with hirer—Express carriage **632**
See Road Traffic **1.**

PATIENT — At hospital — Administration of drug to—Overdose—Liability of nurse—Liability of hospital - **11**
See Negligence **1.**

PAYMENT—Appropriation of to one of two debts — Evidence — Intention of debtor - - - - - **156**
See Appropriation of Payments.

PAYMENT INTO COURT—In each of two consolidated actions by separate plaintiffs—Recovery by one plaintiff of more and by the other of less than amount paid in respect of his claim—Order as to costs - **550**
See Costs.

PENALTY—Claim for by common informer—Place used for public entertainment on Lord's day - - - **477**
See Sunday Observance.

PERSONAL ALLOWANCE—For income tax purposes—To married man—Decree of nullity—Additional assessments on difference between single and married man's allowances—Competence of - - - - **503**
See Revenue **4.**

PERSONAL INJURY—To passenger—Action for—Application by defendant for security for costs or transfer to county court—Discretion of judge
See Practice. **215**

—— To workman.
See Workmen's Compensation.

PERSONAL RISK—Policy of motor insurance purporting to exclude—Validity - - - **303, 555**
See INSURANCE (MOTOR) **2.**

PLACE—User for public entertainment on Lord's day—Boxing hall - **477**
See SUNDAY OBSERVANCE.

PLACE OF RESIDENCE—Of mental defective guilty of offence and ordered to institution—Presumption **298**
See LOCAL GOVERNMENT **1.**

PLEADING—In pending action—Publication of by agent of opposite party—Liability to attachment of that party and agent - - - **595**
See CONTEMPT OF COURT.

POLICE—*Right to enter and remain on private premises—Inquiry with regard to suspected offence—Assault and obstruction—"In execution of duty"—Trespass—Metropolitan Police Act*, 1839 (2 & 3 *Vict. c.* 47), *s.* 18—*Prevention of Crimes Amendment Act*, 1885 (48 & 49 *Vict. c.* 75), *s.* 2.
DAVIS *v.* LISLE - - - **Div. Ct. 434**

POLICY—Of marine insurance—On full value of cargo—Subsequent increased value policy—Total loss—Both policies paid in full—Salvage—Original insurers entitled to full amount - - - - **121**
See INSURANCE (MARINE) **1.**

—— —— On ship—Running down clause—Whether applicable to liability arising from contract - - **461**
See INSURANCE (MARINE) **2.**

—— Of motor insurance against third-party risks—Cancellation—Effect
See INSURANCE (MOTOR) **3.** **253**

—— —— Insurer liable in respect of passenger carried under contract of employment—Contract of employment whether with insured only or with any employer—Provisions excluding personal risk—Validity **303, 555**
See INSURANCE (MOTOR) **2.**

POTATO MARKETING BOARD—Return to—Whether a privileged document
See DISCOVERY. **226**

PRACTICE—*Accident—Action for damages for negligence—Defendant's application for security for costs and in default for transfer of action to county court—Discretion of judge—Exercise on wrong principles—County Courts Act*, 1919 (9 & 10 *Geo.* 5, *c.* 73), *s.* 2.
STEVENS *v.* WALKER - - **C. A. 215**

—— Parties—Defendants—Joinder of several in one action - - - **477**
See SUNDAY OBSERVANCE.

—— —— Separate plaintiffs—Consolidation of actions - - - - **550**
See COSTS.

PRESUMPTION—As to place of residence—Of mental defective guilty of offence and ordered to institution
See LOCAL GOVERNMENT **1.** **298**

PRINCIPAL AND AGENT — *Commission — Mistake in vendor's instructions to agent—Consequent withdrawal by intending purchaser—Right of agent to recover damages.*
GEORGE TROLLOPE & SONS *v.* CAPLAN **C. A. 382**

—— Publication by agent of adverse comment on action against principal — Liability to attachment of principal and agent - - **595**
See CONTEMPT OF COURT.

—— Whether relationship exists between hospital and skilled nurse—Liability of hospital for negligence of nurse - - - - - **11**
See NEGLIGENCE **1.**

PRIVATE PREMISES — Police officer remaining on after direction to leave — Whether acting in execution of duty - - - - - **434**
See POLICE.

PRIVILEGE—Public interest—Return to Potato Marketing Board - **226**
See DISCOVERY.

PROCEDURE.
See PRACTICE.

PRODUCTION — Privilege — Public interest —Return to Potato Marketing Board - - - - **226**
See DISCOVERY.

PROFITS—Set-off against losses of former years—Payment of interest under deduction of income tax—Profits brought into charge - - **185**
See REVENUE **2.**

PROHIBITED ACT—Injury to workman while doing - - - - **330**
See WORKMEN'S COMPENSATION **2.**

PROHIBITION—Writ of — To county court judge in respect of order for tithe rent-charge—When it lies - **416**
See ECCLESIASTICAL LAW.

—— —— To Minister of Health—Against consenting to appropriation of part of open space for housing purposes
See LOCAL GOVERNMENT **2.** **29**

PROMISSORY NOTE—As security for loan of money — Enforceability — Where memorandum of contract defective
See MONEYLENDER. **370**

—— Validity as, of document invalid as bill of exchange - - - **101**
See BILL OF EXCHANGE.

PROOF—Burden of.
See BURDEN OF PROOF.

PUBLIC ENTERTAINMENT — Place used for on Lord's day — Boxing hall **477**
See SUNDAY OBSERVANCE.

PUBLIC FOOTPATH — Extinction or diversion — Jurisdiction of Railway and Canal Commission to order **19**
See HIGHWAY.

PUBLIC INTEREST—Document privileged on ground of—Return to Potato Marketing Board, whether a - **226**
See DISCOVERY.

PUBLICATION—By agent of defendant—Of statement of claim in pending action—Liability to attachment of defendant and agent - - **595**
See CONTEMPT OF COURT.

PURCHASER.
See VENDOR AND PURCHASER.

QUALIFICATION SHARES — Omission of company director to acquire — Right to sue for services rendered
See COMPANY. **403**

QUANTUM MERUIT—For services rendered by director to company—Where agreement for remuneration void **403**
See COMPANY.

QUESTION—To passenger in motor vehicle as to who is paying the fare—Duty of officer to administer caution - - - - **632**
See ROAD TRAFFIC **1**.

RAILWAY AND CANAL COMMISSION—Jurisdiction — To extinguish or divert public footpath - - **19**
See HIGHWAY.

RAILWAY SERVANT—Fall in street while proceeding from lodgings to station —Accident arising out of employment - - - - - - **90**
See WORKMEN'S COMPENSATION **1**.

RATE OF INTEREST—On money lent—No statement in memorandum that it was calculated in accordance with the Act—Enforceability of contract
See MONEYLENDER. **370**

RATING — *Assessment* — *Rateable value* — *Licensed premises* — *Tied house* — *Competition of brewers occupying by manager*—*Rating and Valuation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22, *sub-s.* 1.

ROBINSON BROTHERS (BREWERS), LD. *v.* ASSESSMENT COMMITTEE FOR THE NO. 7 OR HOUGHTON AND CHESTER-LE-STREET AREA OF THE COUNTY OF DURHAM **Div. Ct. 283**

2.—— *Licensed premises*—*Valuation list*—*Deduction of monopoly value in estimating gross value*—*Payment of monopoly value by annual instalments*—*Rating and Valuation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 68.

APPENRODT *v.* CENTRAL MIDDLESEX ASSESSMENT COMMITTEE - **Div. Ct. 447**

RATING—*continued.*

3.——*Proposal to amend valuation list*—*Objection to proposal by Rating Authority before Assessment Committee*—*Appointment of officer of Rating Authority as clerk to Assessment Committee* — *Validity* — *Bias* — *Rating and Valuation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 55, *sub-s.* 1; *Sch. I.*, *cl.* 12; *Sch. IV.*, *Part III.*, *cl.* 4—*Local Government Act*, 1929 (19 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.

THE KING *v.* SALFORD ASSESSMENT COMMITTEE. *Ex parte* OGDEN - **Div. Ct. 626**

—— Rates paid by landlord—Compounding for—Permitted increase of rent—Percentages of "net rent" - **605**
See LANDLORD AND TENANT **1**.

REASONABLE TIME—Before action for infringement of copyright—Allowance of to innocent possessor of offending copies - - - **176**
See COPYRIGHT.

RECEIVER—Of tithe rentcharge—Order of county court appointing—Alleged excess of jurisdiction—Whether prohibition lies to receiver - **416**
See ECCLESIASTICAL LAW.

REFEREE—Medical.
See MEDICAL REFEREE.

REFERENCE—By county court judge to registrar—Of whole action for inquiry and report—Jurisdiction
See COUNTY COURT. **324**

REGISTRAR—Of county court—Functions of in connection with medical reference only ministerial - **1**
See WORKMEN'S COMPENSATION **4**.

—— —— Reference to by judge of whole action without consent of parties —Proceedings thereby rendered void
See COUNTY COURT. **324**

—— —— Taxation of costs — Discretion as to amount — Jurisdiction of judge to review - - - **138**
See WORKMEN'S COMPENSATION **3**.

REMUNERATION—For work done in absence of contract—Basis of obligation to pay - - - - - **403**
See COMPANY.

RENT—Of coal mine—Rent consisting partly of free coal—Mineral rights duty whether leviable on value of free coal - - - - - **316**
See REVENUE **10**.

—— Restriction of.
See LANDLORD AND TENANT.

RENT-CHARGE—For tithe.
See Tithe Rent-charge.

—— Jointure — Payment clear of all deductions for taxes — Assessment of sur-tax—Whether on net rent-charge or on net rent-charge plus income tax thereon - - - **582**
See Revenue **9**.

RESIDENCE—Of Methodist minister in manse—Payment of Sch. A tax and rates by Church—Emoluments of office—Liability to Sch. E income tax - - - - - - **645**
See Revenue **5**.

—— Presumption as to place of.
See Local Government **1**.

RESTRICTION OF RENT.
See Landlord and Tenant.

REVENUE — *Income Tax — Assessments under Schs. A and B—Lands not in fact capable of beneficial occupation apart from house—Assessment on person entitled to occupation—Income Tax Act*, 1918, *Sch. A, No. I., No. VII., rr.* 1, 2, 4; *Sch. B, r.* 4.
Bertram *v.* Wightman (Inspector of Taxes) - - - - **Lawrence J. 521**

2. —— —— *Claim to set off profits of one year against losses of former years — Payment of interest under deduction of tax—" Profits or gains brought into charge to tax "— Assessment of payer — Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21; *Rules applicable to Cases I. and II. of Sch. D, r.* 6, *sub-ss.* 1, 3—*Finance Act*, 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 33, *sub-s.* 1.
Trinidad Petroleum Development Co., Ld. *v.* Commissioners of Inland Revenue **Lawrence J. 185**

3. —— —— *Loan by Bank — Interest debited by Bank to loan account— Application by borrower to recover income tax on interest so debited—Payment of interest " out of profits or gains brought into charge to tax "— Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 36, *sub-s.* 1.
Fenton's Trustee *v.* Commissioners of Inland Revenue - - - **C. A. 59**

4. —— —— *Personal allowance—Married man—Wife living with, or wholly maintained by, him—Decree of nullity—Additional assessments on difference between single and married man's allowances—Marriage not void for all purposes—Completed transactions not to be reopened—New facts coming into existence after year of assessment—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 125—*Finance Act*, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 18, *sub-s.* 1.
Dodsworth (H.M. Inspector of Taxes) *v.* Dale - - - - **Lawrence J. 503**

REVENUE—*continued.*

5. —— ——*Sch. E—Minister of Methodist Church — Required residence in manse — Payment of Sch. A tax and rates by employers on his behalf—Emoluments of office.*
Reed *v.* Cattermole **Lawrence J. 645**

6. —— —— *Society to promote interests of foxhound breeding—Annual foxhound show—Society to promote interests of live-stock breeding —" Agricultural society "—Charitable society —Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37—*Finance Act*, 1921 (11 & 12 *Geo.* 5, *c.* 32), *s.* 30—*Finance Act*, 1924 (14 & 15 *Geo.* 5, *c.* 21), *s.* 23—*Finance Act*, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 24.
Peterborough Royal Foxhound Show Society *v.* Commissioners of Inland Revenue - - - **Lawrence J. 497**

7. —— —— *Sur-tax—Avoidance—" Exceptional and not systematic "—One avoidance by a number of sales—Finance Act*, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 33, *sub-ss.* 3, 4.
Bilsland *v.* The Commissioners of Inland Revenue - - - **Lawrence J. 542**

8. —— —— —— *Company—Dividend—Deduction of tax—Shareholder's liability—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20—*Finance Act*, 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 39, *sub-s.* 2—*Finance Act*, 1931 (21 & 22 *Geo.* 5, *c.* 28), *s.* 7.
Commissioners of Inland Revenue *v.* Pearson. Same *v.* Pratt **Lawrence J. 533**

9. —— —— *Super-tax — Jointure rent-charge payable " clear of all deductions whatsoever for taxes "— Assessment of super-tax and sur-tax—Whether on net rentcharge or on net rentcharge plus income tax thereon— Shrewsbury Estate Act*, 1843 (6 & 7 *Vict. c.* 28 (*private*)) *ss.* 7, 9, 10—*Shrewsbury Estate Act*, 1862 (25 & 26 *Vict. c.* 5 (*private*)), *s.* 3.
Shrewsbury (Countess) *v.* Commissioners of Inland Revenue - - **Lawrence J. 582**

10. —— *Mineral Rights Duty — Rent — " Rental value " of free coal supplied by lessees to lessors—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 20, *sub-ss.* 1, 2; *s.* 24.
Commissioners of Inland Revenue *v.* Lord Hatherton (Executors) **Lawrence J. 316**

11. —— *Stamp Duty—Conveyance on Sale—Sale by auction to same purchaser of land in several lots from same vendors—Series of transactions —Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 73.
Attorney - General *v.* Cohen and Another. - - - **Lawrence J. 246**

RESOLUTION—Of London County Council —For appropriation of land—Whether to be under seal - **29**
See Local Government **2**.

RISK—Third-party liability of motorist.
See Personal Risk.

ROAD TRAFFIC—*Express carriage—Taxi-cab—No Road Service Licence—Sharing of fare by passengers—Persons carried "in consideration of separate payments made by them"—Offence—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-ss.* 1 (*b*), 2; *s.* 72, *sub-s.* 10.
Newell *v.* Cross. Newell *v.* Cook. Newell *v.* Plume. Newell *v.* Chenery **Div. Ct. 632**

2. —— *Goods Vehicles — Licence — Trader entitled to licence—Agreement for use of name and tonnage by another person—Illegality—Road and Rail Traffic Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 1, *sub-ss.* 1, 3, 8; *s.* 2, *sub-s.* 6; *s.* 6, *sub-s.* 1; *s.* 7, *sub-s.* 2; *s.* 16, *sub-s.* 1; *s.* 21.
Nash *v.* Stevenson Transport, Ld. **C. A. 128**

RULES AND ORDERS:—

—— *Admiralty Tugs Engagement Terms*: Furness Withy & Co. *v.* Duder **Branson J. 461**

—— *County Court Rules, Order* LIII., *rr.* 7, 8: White *v.* Altrincham Urban District Council - **C. A. 138**

—— *Solicitors' Accounts Rules,* 1935 (S. R. & O., 1934, No. 718/L. 18): Plunkett and Anr. *v.* Barclays Bank Ld. - - - **du Parcq J. 107**

—— *Supreme Court Rules, Order* XVI., *r.* 4: Green *v.* Berliner and Others - - **du Parcq J. 477**

—— —— *Order* XLV., *r.* 2: Plunkett and Anr. *v.* Barclays Bank Ld. **du Parcq J. 107**

—— —— *Order* LVII., *r.* 7: De La Rue *v.* Hernu, Peron & Stockwell, Ld. **C. A. 164**

—— *Tithe Rentcharge Recovery Rules,* 1891–1933, *rr.* 5, 8, 9, 11: Governors of Queen Anne's Bounty *v.* Pitt-Rivers - **Div. Ct. 416**

—— *Workmen's Compensation Rules,* 1926, *r.* 57: Burgoyne *v.* Rose Bridge Colliery Co. - - - **C. A. 1**

—— —— *rr.* 76, 78: White *v.* Altrincham Urban District Council **C. A. 138**

RUNNING DOWN CLAUSE—In marine policy—Whether applicable to liability arising from contract - **461**
See Insurance (Marine) **2.**

SALE OF HOUSE—By builder—No duty to purchaser or occupant to take care that house is well built - **46**
See Negligence **2.**

SALE OF LAND—Conveyance on sale—Stamp duty - - - **246**
See Revenue **11.**

SALVAGE—Of cargo—After payment in full by original and increased value insurers—Original insurers entitled to full amount - - - **121**
See Insurance (Marine) **1.**

SEAL—Whether resolution of local authority for appropriation of land must be under - - - - - **29**
See Local Government **2.**

SERIES OF TRANSACTIONS—Transactions not forming—Sale to same purchaser of land in several lots from same vendors—Stamp duty - - **246**
See Revenue **11.**

SECURITY FOR COSTS—Defendant's application for—Discretion of Judge **215**
See Practice.

SERVANT.
See Master and Servant.

SET-OFF—By taxpayer—Of profits of one year against losses of former years—Payment of interest under deduction of income tax—Profits brought into charge - - - - - **185**
See Revenue **2.**

SEVERANCE—Of contract to buy shares contained in one document and contract to pay for them in another document—Impossibility of - **193**
See Master and Servant.

SHAREHOLDER — Dividend — Payment without deduction of income tax—Liability of shareholder for tax **533**
See Revenue **8.**

—— Qualification shares.
See Company.

SOLICITOR—Client account with bank—Debt owing from banker to solicitor—Garnishee order on bank in respect of debt—Cheque by solicitor on client account marked "refer to drawer"—Claim for libel - **107**
See Attachment of Debt.

STAMP DUTY—Conveyance on sale—Sale to same purchaser of land in several lots from same vendors—Each sale not part of a series of transactions - - - **246**
See Revenue **11.**

STATEMENT OF CLAIM—In pending action—Publication of by agent of defendants without their knowledge—Liability to attachment of defendants and agent - - - **595**
See Contempt of Court.

STATUTE—Special Act not affected by inconsistent provision of general Act - - - - - **29**
See Local Government **2.**

STATUTES:—

1781.

21 Geo. 3, c. 49 (Sunday Observance), ss. 1, 2, 3: Green *v.* Berliner and Others - - - **du Parcq J. 477**

1831.

1 & 2 Will. 4, c. 37 (Truck), ss. 1, 3, 4, 25: Kenyon *v.* Darwen Cotton Manufacturing Co. - - **C. A. 193**

1835.

5 & 6 Will. 4, c. 50 (Highway), ss. 84, 85: Hoddesdon U.D.C. *v.* Broxbourne Sand and Ballast Pits, Ld. **R. & C. C. 19**

1839.

2 & 3 Vict. c. 47 (Metropolitan Police), s. 18: Davis *v.* Lisle - - **Div. Ct. 434**

1843.

6 & 7 Vict. c. 28 (private) (Shrewsbury Estate), ss. 7, 9, 10: Shrewsbury (Countess) *v.* Commissioners of Inland Revenue - **Lawrence J. 582**

1848.

11 & 12 Vict. c. 42 (Indictable Offences), s. 17: Rex *v.* Gee - **C. C. A. 442**

1862.

25 & 26 Vict. c. 5 (private) (Shrewsbury Estate), s. 3: Shrewsbury (Countess) *v.* Inland Revenue Commissioners - **Lawrence J. 582**

1882.

45 & 46 Vict. c. 61 (Bills of Exchange), s. 6, sub-s. 1; s. 20, sub-s. 1; s. 64, sub-s. 1: Haseldine *v.* Winstanley - - **Horridge J. 101**

45 & 46 Vict. c. 75 (Married Women's Property), ss. 12, 17: De La Rue *v.* Hernu, Peron & Stockwell, Ld. - - - - **C. A. 164**

1885.

48 & 49 Vict. c. 75 (Prevention of Crimes Amendment), s. 2: Davis *v.* Lisle **Div. Ct. 434**

1887.

50 & 51 Vict. c. 46 (Truck Amendment), s. 2: Kenyon *v.* Darwen Cotton Manufacturing Co. - **C. A. 193**

1891.

54 Vict. c. 8 (Tithe), s. 2, sub-ss. 1, 7; s. 3, sub-s. 1: Governors of Queen Anne's Bounty *v.* Pitt-Rivers - - **Div. Ct. 416**

1893.

56 & 57 Vict. c. lxxi. (London Open Spaces), ss. 5, 12: Rex *v.* Minister of Health - - - **Div. Ct. 29**

STATUTES—*continued.*

1910.

10 Edw. 7, c. 8 (Finance 1909-10), ss. 20, sub-ss. 1, 2; 24: Commissioners of Inland Revenue *v.* Lord Hatherton (Executors) **Lawrence J. 316**

—— —— s. 73: Att.-Gen. *v.* Cohen and Another - - **Lawrence J. 246**

1911.

1 & 2 Geo. 5, c. 46 (Copyright), s. 2, sub-s. 2: Van Dusen *v.* Kritz **Goddard J. 176**

1913.

3 & 4 Geo. 5, c. 28 (Mental Deficiency), ss. 43, 44: London County Council *v.* Cambridgeshire County Council - **Div. Ct. 298**

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), s. 36, sub-s. 1: Fenton's Trustee *v.* Commissioners of Inland Revenue - - - **C. A. 59**

—— —— s. 37: Peterborough Royal Foxhound Show Society *v.* Commissioners of Inland Revenue **Lawrence J. 497**

—— —— s. 125: Dodsworth *v.* Dale **Lawrence J. 503**

—— —— Sch. A, No. I., No. VII., rr. 1, 2, 4; Sch. B, r. 4: Bertram *v.* Wightman - - **Lawrence J. 521**

—— —— Sch. A; Sch. E: Reed *v.* Cattermole - **Lawrence J. 645**

- - —— All Schedules Rules, rr. 19, 21; Rules applicable to Cases I. and II. of Sch. D, r. 6, sub-rr. 1, 3: Trinidad Petroleum Development Co., Ld. *v.* Commissioners of Inland Revenue - - **Lawrence J. 185**

—— —— All Schedules Rules, r. 20: Commissioners of Inland Revenue *v.* Pearson - **Lawrence J. 533**

1919.

9 & 10 Geo. 5, c. 73 (County Courts), s. 2: Stevens *v.* Walker - **C. A. 215**

—— —— s. 6: Morgan *v.* Cullen **C. A. 324**

1920.

10 & 11 Geo. 5, c. 17 (Increase of Rent and Mortgage Interest (Restrictions)), s. 2, sub-s. 1 (*a*), (*c*), (*d*), (*e*); s. 12, sub-s. 1 (*c*): Strood Estates Co., Ld. *v.* Gregory - **C. A. 605**

—— —— s. 12, sub-s. 2: Heginbottam *v.* Watts - - - **C. A. 6**

10 & 11 Geo. 5, c. 18 (Finance), s. 18, sub-s. 1: Dodworth *v.* Dale **Lawrence J. 503**

STATUTES—*continued.*

1921.

11 & 12 Geo. 5, c. 32 (Finance), s. 30: Peterborough Royal Foxhound Show Society *v.* Commissioners of Inland Revenue - **Lawrence J. 497**

1923.

13 & 14 Geo. 5, c. 20 (Mines (Working Facilities and Support)), ss. 3, 13: Hoddesdon U.D.C. *v.* Broxbourne Sand and Ballast Pits, Ld. **Ry. & C. C. 19**

1924.

14 & 15 Geo. 5, c. 21 (Finance), s. 23: Peterborough Royal Foxhound Show Society *v.* Commissioners of Inland Revenue - **Lawrence J. 497**

1925.

15 & 16 Geo. 5, c. 14 (Housing), ss. 65, 103, 120, sub-s. 1; 134: Rex *v.* Minister of Health. *Ex parte* Villiers - - **Div. Ct. 29**

15 & 16 Geo. 5, c. 84 (Workmen's Compensation), s. 1: Alderman *v.* Great Western Railway Co. **C. A. 90**

—— —— s. 1, sub-ss. 1, 2: Knowles *v.* Southern Railway Co. **C. A. 330**

—— —— s. 19: Burgoyne *v.* Rose Bridge Colliery Co., Ld. **C. A. 1**

15 & 16 Geo. 5, c. 90 (Rating and Valuation), s. 22, sub-s. 1: Robinson Brothers (Brewers), Ld. *v.* Houghton and Chester-le-Street Assessment Committee **Div. Ct. 283**

—— —— s. 55, sub-s. 1; Sch. I., cl. 12; Sch. IV., Part III., cl. 4: Rex *v.* Salford Assessment Committee **Div. Ct. 626**

—— —— s. 68: Appenrodt *v.* Central Middlesex Assessment Committee **Div. Ct. 447**

1926.

16 & 17 Geo. 5, c. 22 (Finance), s. 33, sub-s. 1: Trinidad Petroleum Development Co. *v.* Commissioners of Inland Revenue **Lawrence J. 185**

1927.

17 & 18 Geo. 5, c. 10 (Finance), s. 24: Peterborough Royal Foxhound Show Society *v.* Commissioners of Inland Revenue **Lawrence J. 497**

—— —— s. 33, sub-ss. 3, 4: Bilsland *v.* Commissioners of Inland Revenue **Lawrence J. 542**

—— —— s. 39, sub-s. 2: Commissioners of Inland Revenue *v.* Pearson **Lawrence J. 533**

STATUTES—*continued.*

17 & 18 Geo. 5, c. 21 (Moneylenders), s. 6, sub-s. 2: Mason & Wood, Ld. *v.* Greene - - - **C. A. 370**

1929.

19 Geo. 5, c. 17 (Local Government), s. 15, sub-s. 1: Rex *v.* Salford Assessment Committee **Div. Ct. 626**

19 & 20 Geo. 5, c. 23 (Companies), ss. 141, 143: Craven-Ellis *v.* Canons, Ld. **C. A. 403**

1930.

20 & 21 Geo. 5, c. 43 (Road Traffic), s. 36. sub-s. 1 (*b*) (i.) (ii.): Izzard *v.* Universal Insurance Co., Ld. **MacKinnon J. 303; C. A. 555**

—— —— s. 36, sub-s. 5: Croxford *v.* Universal Insurance Co. **C. A. 253**

—— —— s. 61, sub-ss. 1 (*b*), 2; s. 72, sub-s. 10: Newell *v.* Cross **Div. Ct. 632**

1931.

21 & 22 Geo. 5, c. 28 (Finance), s. 7: Commissioners of Inland Revenue *v.* Pearson **Lawrence J. 533**

21 & 22 Geo. 5, c. 42 (Agricultural Marketing), ss. 1, 5, 17, sub-s. 2: Rowell *v.* Pratt - - - **C. A. 226**

1933.

23 & 24 Geo. 5, c. 24 (Solicitors), ss. 1, 8: Plunkett and Another *v.* Barclays Bank Ld. **du Parcq J. 107**

23 & 24 Geo. 5, c. 32 (Rent and Mortgage Interest Restrictions (Amendment)), s. 1, sub-s. 2: Heginbottam *v.* Watts - - - - **C. A. 6**

23 & 24 Geo. 5, c. 36 (Administration of Justice (Miscellaneous Provisions)), s. 2, sub-s. 1: Rex *v.* Gee **C. C. A. 442**

23 & 24 Vict. c. 53 (Road and Rail Traffic), s. 1, sub-ss. 1, 3, 8; s. 2, sub-s. 6; s. 6, sub-s. 1; s. 7, sub-s. 2; s. 16, sub-s. 1; s. 21: Nash *v.* Stevenson Transport, Ld. - - **C. A. 128**

1934.

24 & 25 Geo. 5, c. 17 (County Courts (Amendment)), s. 20: Morgan *v.* Cullen - - - **C. A. 324**

24 & 25 Geo. 5, c. 41 (Law Reform (Miscellaneous Provisions)): Strangways-Lesmere *v.* Clayton **Horridge J. 11**

24 & 25 Geo. 5, c. 50 (Road Traffic), s. 10, sub-ss. 1, 3; s. 42: Croxford and Others *v.* Universal Insurance Co. - - - - **C. A. 253**

STRUCTURAL ALTERATION—Of dwelling-house—Right of landlord to increase of rent calculated at percentage of expenditure - - - - **605**
See LANDLORD AND TENANT **1.**

SUBROGATION—Of motor insurance company—To rights of insured - **359**
See INSURANCE (MOTOR) **1**.

—— Of underwriter—On payment of total loss - - - - - **121**
See INSURANCE (MARINE) **1.**

SUNDAY OBSERVANCE—*Place used for public entertainment on Lord's Day—Boxing hall—Claims by common informer for penalties against keeper of place, master of ceremonies, and advertisers—Right to join all defendants in one action—Whether person not actually present can be keeper of place—Whether name on advertisement is proof that person printed it—Judge, whether bound by previous decision of Judge of concurrent jurisdiction—Sunday Observance Act*, 1781 (21 *Geo.* 3, *c.* 49), *ss.* 1, 2, 3.
GREEN *v.* BERLINER AND OTHERS
du Parcq J. 477

SUPER-TAX.
See REVENUE **7–9**.

SUR-TAX.
See REVENUE **7–9**.

TAX—Government duty.
See REVENUE.

TAXATION—Of costs—Discretion of county court registrar as to amount—Jurisdiction of county court judge to review - - - - **138**
See WORKMEN'S COMPENSATION **3**.

TAXICAB—Sharing of fare by passengers pursuant to antecedent contract—Express carriage - - - **632**
See ROAD TRAFFIC **1**.

TENANT.
See LANDLORD AND TENANT.

THIRD-PARTY RISKS—Motor insurance policy—Insurer to be liable in respect of person carried under contract of employment—Contract of employment whether with insured person only or with any employer - - - - **303, 555**
See INSURANCE (MOTOR) **2**.

—— —— Judgment recovered by third party against insured — Action by third party against insurer on judgment - - - - **253**
See INSURANCE (MOTOR) **3**.

TIED HOUSE—Rateable value—Competition of brewers - - - **283**
See RATING **1.**

TIME—Reasonable.
See REASONABLE TIME.

TITHE RENT-CHARGE—Application to county court for—No notice of opposition by landowner—Right of landowner to be heard - **416**
See ECCLESIASTICAL LAW.

TOTAL LOSS—Of cargo—Original and increased value policies paid in full—Salvage—Original insurers entitled to full amount - - - - **121**
See INSURANCE (MARINE) **1.**

TOWAGE—Contract for—Payment under by shipowner of collision damage—Liability of underwriter of policy on ship to indemnify shipowner **461**
See INSURANCE (MARINE) **2.**

TRANSFER—Of action to county court—Defendant's application for—Discretion of judge - - - **215**
See PRACTICE.

TRESPASS—By police officer—Remaining on private premises after direction to leave - - - - - **434**
See POLICE.

TRIAL—Committal for.
See COMMITTAL FOR TRIAL.

TRUST—Injury to motor-car in collision—Owner receiving part damage from his own insurer—Owner subsequently recovering full damage from owner of colliding car—Amount recovered held in trust to extent of sum received from insurer **359**
See INSURANCE (MOTOR) **1.**

ULTRA VIRES—Whether certain Rules as to tithe rent-charge are - **416**
See ECCLESIASTICAL LAW.

USER OF LAND—For income tax purposes—Person entitled to beneficial use
See REVENUE **1.** **521**

—— Noise maliciously caused to injure owner of adjoining land - **468**
See NUISANCE.

VALUATION LIST—Licensed premises—Monopoly value—Deduction in estimating gross rental - - **447**
See RATING **2.**

—— Proposal to amend — Objection to proposal by rating authority before assessment committee — Appointment of officer of rating authority as clerk to assessment committee—Validity - - - - - **626**
See RATING **3.**

VENDOR AND PURCHASER—Mistake in vendor's instructions to estate agent—Consequent withdrawal by intending purchaser—Agent's damages **382**
See PRINCIPAL AND AGENT.

VENDOR AND PURCHASER—*continued.*

—— Sale of house by builder—No duty to purchaser or occupant to take care that house well built - - **46**
See Negligence **2.**

—— Sale of houses in separate lots—Each sale not part of a larger transaction or of a series of transactions—Stamp duty - - - - - **246**
See Revenue **11.**

WAGES—Deductions—Agreement between servant and employing company for servant to take shares—Payment by deductions from wages—Whole of wages not paid in coin—Illegality of contract - - **193**
See Master and Servant.

WAREHOUSEMAN—Property stored with by wife—Action in detinue against by husband—Right of warehouseman to interplead - - **164**
See Husband and Wife.

WARRANTY—Absence of—On sale of house by builder—That house is safe **46**
See Negligence **2.**

WAY.
See Highway.

WIFE.
See Husband and Wife.

WITHDRAWAL—Of intending purchaser—As result of mistake in vendor's instructions to estate agent—Agent's damages - - - - **382**
See Principal and Agent.

WITNESS—Fees paid to—Bill of costs—Discretion of county court registrar as to amount—Right of judge to review - - - - - **138**
See Workmen's Compensation **3.**

WORDS:—

—— "Advertisement" (of Sunday entertainment): Green *v.* Berliner **du Parcq J. 477**

—— "Agricultural society": Peterborough Royal Foxhound Show Society *v.* Commissioners of Inland Revenue - - **Lawrence J. 497**

—— "Arising out of and in the course of the employment" (accident): Alderman *v.* Great Western Railway Co. - - - **C. A. 90**

—— "Carried in a motor-vehicle": Newell *v.* Cross - - - **Div. Ct. 632**

—— "Clear of all deductions whatsoever for taxes": Countess of Shrewsbury *v.* Commissioners of Inland Revenue - - **Lawrence J. 582**

WORDS—*continued.*

—— "Contract of employment": Izzard *v.* Universal Insurance Co., Ld. **MacKinnon J. 303; C. A. 555**

—— "Employment" (course of): Knowles *v.* Southern Railway Co. **C. A. 330**

—— "Exceptional and not systematic": Bilsland *v.* Inland Revenue Commissioners - **Lawrence J. 542**

—— "Execution of duty" (police when on premises in): Davis *v.* Lisle **Div. Ct. 434**

—— "Express carriage": Newell *v.* Cross - - - **Div. Ct. 632**

—— "Generalia specialibus non derogant": Rex *v.* Minister of Health **Div. Ct. 29**

—— "Government Department" (Potato Marketing Board): Rowell *v.* Pratt - - **C. A. 226**

—— "Indictment" (Invalidity—Irregular proceedings before committing justices): Rex *v.* Gee **C. C. A. 442**

—— "Keeper" (Of place of Sunday entertainment): Green *v.* Berliner **du Parcq J. 477**

—— "Knock for knock" (Agreement between insurers): Morley *v.* Moore **C. A. 359**

—— "Knowledge" (Imputation of): Van Dusen *v.* Kritz **Goddard J. 176**

—— "Market value" (of licensed premises): Robinson Brothers (Brewers), Ld. *v.* Houghton and Chester-le-Street Assessment Committee **Div. Ct. 283**

—— "Master of ceremonies" (At place of Sunday entertainment). Green *v.* Berliner - - **du Parcq J. 477**

—— "Memorandum" (Of moneylending contract): Mason & Wood, Ld. *v.* Greene - - - **C. A. 370**

—— "Net rent": Strood Estates Co., Ld. *v.* Gregory - - **C. A. 605**

—— "Occupation" (For income tax purposes): Bertram *v.* Wightman **Lawrence J. 521**

—— "Out of profits or gains brought into charge to tax" (payment of interest): Fenton's Trustee *v.* Commissioners of Inland Revenue - - - **C. A. 59**

—— "Payment . . . . of wages" (otherwise than in current coin): Kenyon *v.* Darwen Cotton Manufacturing Co. - - - **C. A. 193**

WORDS—*continued.*

—— "Quantum meruit": CRAVEN-ELLIS *v.* CANONS, LD. - - **C. A. 403**

—— "Rateable value" (of licensed premises): ROBINSON BROTHERS (BREWERS), LD. *v.* HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE - - **Div. Ct. 283**

—— "Refer to drawer" (words written on cheque—effect): PLUNKETT *v.* BARCLAYS BANK LD. - **du Parcq J. 107**

—— "Rent," "Rental value": COMMISSIONERS OF INLAND REVENUE *v.* LORD HATHERTON (EXECUTORS) **Lawrence J. 316**

—— "Separate fares": NEWELL *v.* CROSS **Div. Ct. 632**

—— "Separate payments": NEWELL *v.* CROSS - - - **Div. Ct. 632**

—— "Series of transactions" (sale of houses in lots): ATT.-GEN. *v.* COHEN **Lawrence J. 246**

WORK AND LABOUR—Obligation to pay reasonable remuneration where no contract—Basis of - - **403**
See COMPANY.

WORKMEN'S COMPENSATION — *Accident "arising out of and in the course of the employment" — Travelling Ticket Collector — Necessity of staying in lodgings on one journey —Fall in street in proceeding from lodgings to station—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.
ALDERMAN *v.* GREAT WESTERN RAILWAY CO. **C. A. 90**

WORKMEN'S COMPENSATION—*continued.*

2. —— —— *Whether act done for purpose of employers' business—Rule prohibiting consumption of intoxicating liquor on duty—Workman leaves van for prohibited purpose—Accident in remounting van—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-ss.* 1, 2.
KNOWLES *v.* SOUTHERN RAILWAY CO. **C. A. 330**

3. —— *Costs — Taxation — Fees paid to medical witnesses — Allowance of part only by registrar on taxation — Jurisdiction of county court judge to review quantum—Workmen's Compensation Rules,* 1926, *rr.* 76, 78 — *County Court Rules, Order* LIII., *rr.* 7, 8.
WHITE *v.* ALTRINCHAM URBAN DISTRICT COUNCIL **C. A. 138**

4. —— *Medical Referee — Certificate — County Court Registrar remitting certificate for further answer—Jurisdiction of Registrar—Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 19—*Workmen's Compensation Rules,* 1926, *r.* 57.
BURGOYNE *v.* ROSE BRIDGE COLLIERY CO., LD. - - - - - - **C. A. 1**

WRIT OF PROHIBITION.
See PROHIBITION.

WRIT OF SUMMONS—For alleged infringement of copyright—Premature issue of - - - - - - **176**
See COPYRIGHT.

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2 K.B. (p. 1 to p. 127).

Part VII.—July 1

TABLE OF CASES.

KING'S BENCH DIVISION.

		PAGE
ALDERMAN v. GREAT WESTERN RAILWAY CO.	C. A.	90
BOAG v. STANDARD MARINE INSURANCE CO.		121
BURGOYNE v. ROSE BRIDGE COLLIERY CO.	C. A.	1
FENTON'S TRUSTEE v. INLAND REVENUE COMMISSIONERS	C. A.	59
HASELDINE v. WINSTANLEY		101
HEGINBOTTAM v. WATTS	C. A.	6
HODDESDON U. D. C. v. BROXBOURNE SAND AND BALLAST PITS, LD. HERTFORDSHIRE COUNTY COUNCIL v. THE SAME		19
OTTO v. BOLTON AND NORRIS		46
PLUNKETT v. BARCLAYS BANK, LD.		107
REX v. MINISTER OF HEALTH. *Ex parte* VILLIERS		29
STRANGWAYS-LESMERE v. CLAYTON		11

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